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Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

COMMON CAUSE OF PENNSYLVANIA; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; REPRESENTATIVE GREGORY VITALI; TIM POTTS; CARL H. SILVERMAN; WILLIAM R. KOCH; AND H. WILLIAM MCINTYRE,

Petitioners,

v.

EDWARD G. RENDELL, GOVERNOR; ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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September 4, 2009

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QUESTIONS PRESENTED

1. Do plaintiffs alleging violation of their own individual rights under specific provisions of the Bill of Rights and the Fourteenth Amendment lack standing in federal court under the "generalized grievance" doctrine simply because the rights of many other citizens were also violated?

2. Must plaintiffs alleging a biased state tribunal in violation of due process offer proof of their allegations at the pleading stage, or subject themselves to the unfair trial and forfeit a federal forum, in order to establish standing?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs Appellants and Petitioners: Common Cause of Pennsylvania; The League of Women Voters of Pennsylvania; Representative Gregory Vitali; Tim Potts; Carl H. Silverman; William R. Koch; and H. William McIntyre.

Defendants-Appellees and Respondents: Governor Edward G. Rendell, in his official capacity as Governor of the Commonwealth of Pennsylvania; Robert C. Jubelirer, personally and his successor in office, Dominic F. Pileggi, in his official capacity as the Majority Leader of the Senate of Pennsylvania; John M. Perzel, personally and his successor in office, Todd A. Eachus, in his official capacity as Majority Leader of the House of Representatives of Pennsylvania; Robert J. Mellow, personally and in his official capacity as the Minority Leader of the Senate of Pennsylvania; H. William DeWeese, personally and his successor in office, Samuel H. Smith, in both his official capacity as the Minority Leader of the House of Representatives of Pennsylvania and as an original party to this action both personally and in his official capacity as a Member of the General Assembly of Pennsylvania; David J. Brightbill, personally and his successor in office, Jane Clare Orie, in her official capacity as the Majority Whip of the Senate of Pennsylvania; David G. Argall, personally and in his official capacity as a Member of the General Assembly of Pennsylvania; Michael R. Veon, personally and his successor in office, Michael A. O'Pake, in his official

capacity as the Minority Whip of the House of Representatives of Pennsylvania; and Ralph J. Cappy, personally and his successor in office, Ronald D. Castille, in his official capacity as the Chief Justice of the Supreme Court of Pennsylvania.

Defendants: Commonwealth of Pennsylvania and Robert P. Casey, Jr., personally and in his official capacity as Treasurer of Pennsylvania, were parties in the District Court. Both were dismissed from the action.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED . 1

STATEMENT OF THE CASE 2

1. A history of trading money for court rulings to shut the public out of the legislative process 3

2. The enactment of Act 44 5

3. Reaction to Act 44 6

4. Procedural posture of this litigation 8

REASONS FOR GRANTING THE PETITION .. 11

I. THE DECISION OF THE INTER-CIRCUIT PANEL CONFLICTS WITH THIS COURT'S STANDING JURISPRUDENCE 12

A. The Inter-circuit Panel Opinion Misunderstands the Nature of a

"Generalized Grievance" for Purposes of Standing 12

B. The Inter-circuit Panel Opinion Conflicts with Well-Settled Supreme Court Precedent that Plaintiffs Need Merely Plead, and not Prove, Their Factual Assertions at the Pleadings Stage, Even as to Their Standing to Sue 15

II. THE INTER-CIRCUIT PANEL OPINION REFLECTS THE GROWING CONFLICT AND CONFUSION IN THE CIRCUITS OVER THE SWEEP OF THE "GENERALIZED GRIEVANCE" DOCTRINE 19

III. THIS CASE PRESENTS ISSUES OF GREAT CONSTITUTIONAL AND PUBLIC IMPORTANCE 26

A. By Barring Constitutional Claims in Which Large Numbers of Individuals Suffer Personal Injury, the Decision and Those Like It Threaten to Curtail Protection of Established Rights 26

B. Broader, Important Public Issues and Public Values – and the Role of Federal Courts in Addressing Them – are at Stake in This Case 31

CONCLUSION 34

APPENDIX

Appendix A: Third Circuit Opinion, dated February 26, 2009 ..... 1a

Appendix B: District Court Memorandum, dated June 12, 2006 ..... 44a

Appendix C: Third Circuit Order denying rehearing, dated April 7, 2009 ..... 88a

Appendix D: Constitutional Provisions Involved 91a

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 17

Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist.,
873 F.2d 25 (2d Cir. 1989) 20

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 18

Baker v. Carr,
369 U.S. 186 (1962) 28, 29

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 18, 19

Bishop v. Bartlett, No. 07-1840,
2009 WL 2341984 (4th Cir. July 29, 2009) . . . 23

Bracy v. Gramley,
520 U.S. 899 (1997) 16, 30, 31

Buckley v. Valeo,
424 U.S. 1 (1976) 29

Bush v. Vera,
517 U.S. 952 (1996) 28

Caperton v. A.T. Massey Coal Co., Inc.,
___ U.S. ___, 129 S.Ct. 2252
(June 8, 2009) 31

Clements v. Fashing,
457 U.S. 957 (1982) 17

Common Cause of Pa. v. Commonwealth,
668 A.2d 190 (Pa. Commw. Ct. 1995), *aff'd*, 544 Pa. 512, 677 A.2d 1206 (1996) 4, 17

Common Cause of Pa. v. Commonwealth,
710 A.2d 108 (Pa. Commw. Ct. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000) 4, 17

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 31

Cuidados Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807 (5th Cir. 1980) 21

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 20

Devlin v. Scardelletti,
536 U.S. 1 (2002) 20

Dillard v. Chilton County Comm'n,
495 F.3d 1324 (11th Cir. 2007) 24

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473 F.3d 188 (5th Cir. 2006) 21

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 20

Engquist v. Oregon Dep't of Agric.,
553 U.S. __, 128 S.Ct. 2146 (2008) 27

Federal Election Comm'n v. Akins,
524 U.S. 11 (1998) 14

Foremaster v. City of St. George,
882 F.2d 1485 (10th Cir. 1989) 21

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 17

Georgia State Conference of NAACP Branches v. Cox,
183 F.3d 1259 (11th Cir 1999) 22, 23

Hein v. Freedom From Religion Found., Inc.,
551 U.S. 587 (2007) 20

In re Roberts,
5 Colo. 525 (1881) 32

Johnson v. Bredesen, Nos. 07-0372, 07-0373,
2008 WL 701584 (M.D. Tenn. Mar. 13, 2008) 24

Johnson v. Bredesen, Nos. 08-6013, 08-6106,
2009 WL 2251301 (6th Cir. July 28, 2009) 24, 25

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549 U.S. 347 (2007) (per curiam) . 20, 23, 24, 28

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692 A.2d 263 (Pa. Commw. Ct. 1997) 4

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683 A.2d 685 (Pa. Commw. Ct. 1996) 4

Los Angeles v. Lyons,
461 U.S. 95 (1983) 17

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 14, 18

Massachusetts v. E.P.A.,
549 U.S. 497 (2007) 14, 15, 17

Medimmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 17

Meyer v. Nebraska,
262 U.S. 390 (1923) 29

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384 U.S. 214 (1966) 29

New Hampshire Right to Life Political Action Comm. v. Gardner,
99 F.3d 8 (1st Cir. 1996) 20

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376 U.S. 254 (1964) 29

Nolles v. State Comm. for Reorganization of Sch. Dists.,
524 F.3d 892 (8th Cir. 2007) 23

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505 U.S. 656 (1993) 17

Opinion of the Justices No. 352,
672 So.2d 1290 (Ala. 1996) 32

Orthmann v. Apple River Campground, Inc.,
757 F.2d 909 (7th Cir. 1985) 10

O'Hair v. White,
675 F.2d 680 (5th Cir. 1982) 21

Papasan v. Allain,
478 U.S. 265 (1986) 18

Pennsylvania AFL-CIO v. Commonwealth,
691 A.2d 1023 (Pa. Commw. Ct. 1997), *aff'd*, 757
A.2d 917 (Pa. 2000) 4, 6

*Pennsylvanians Against Gambling Expansion Fund
et al. v. Commonwealth of Pa. et al.*,
877 A.2d 383, 583 Pa. 275 (2005) 8

People v. Hawkins,
181 Ill.2d 41 (1998) 32

Public Citizen, Inc. v. Bomer,
274 F.3d 212 (5th Cir. 2002) 22

Public Citizen, Inc. v. Miller,
992 F.2d 1548 (11th Cir. 1993)
(per curiam), *aff'd*, 813 F.Supp. 821 (N.D. Ga.
1993) 21, 24

Ross v. Moffitt,
417 U.S. 600 (1974) 27

Rubin v. City of Santa Monica,
308 F.3d 1008 (9th Cir. 2002) 22

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 12

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State v. Benson,
973 S.W.2d 202 (Tenn. 1998) 32

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905 A.2d 918 (Pa. 2006) 6, 7

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283 U.S. 359 (1931) 29

Suhre v. Haywood County,
131 F.3d 1083 (4th Cir. 1997) 21

Swin Res. Sys, Inc. v. Lycoming County,
883 F.2d 245 (3rd Cir. 1989) 10

Toll Bros. v. Twp. of Readington, et al.,
553 F.3d 131 (3rd Cir. 2009) 30

United States v. Hays,
515 U.S. 737 (1995) 12, 20, 28

United States v. Richardson,
418 U.S. 166 (1974) 12

United States v. Students Challenging Regulatory Agency Procedures,
412 U.S. 669 (1973) 13, 18

Valley Forge Christian College v. Americans United for Separation of Church and State,
454 U.S. 464 (1982) 12

Walker v. City of Mesquite,
169 F.3d 973 (5th Cir. 1999) 21

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791 F.2d 1255 (6th Cir. 1986) 21

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495 U.S. 149 (1990) 12, 18

Constitutional and Statutory Provisions

U.S. CONST. amend. I 1
U.S. CONST. amend. V 1
U.S. CONST. amend. XIV 1
U.S. CONST. art. I, sec. 6, cl. 2 12
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PA. CONST. art. III 3
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 8
28 U.S.C. § 1343(a)(3) 8

Rules

Fed. R. Civ. P. 12(b)(1) 8
Fed. R. Civ. P. 12(b)(6) 8

Other Authorities

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Pa. v. Commwealth, 558 F.3d 249 (3rd Cir. 2009) (No. 06-3391) 2

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit, dated February 26, 2009, is officially reported at 558 F.3d 249 (3rd Cir. 2009), and is reproduced at App. A, 1a-43a. The Order of the Third Circuit denying rehearing, dated April 6, 2009, is unreported, and is reprinted at App. C, 88a-90a.

The Memorandum Opinion and Order of the U.S. District Court for the Middle District of Pennsylvania, dated June 12, 2006, is officially reported at 447 F. Supp. 2d 415 (M.D. Pa. 2006), and is reproduced at App. B, 44a-87a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Third Circuit was entered on February 26, 2009. That court denied Petitioners' timely petition for rehearing on April 6, 2009. On June 9, 2009, Justice Souter extended the time for filing a petition for writ of certiorari to and including September 4, 2009. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved are the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the Petition Clause of the First Amendment to the United States Constitution. The relevant constitutional provisions are reproduced at App. D, 91a-92a.

STATEMENT OF THE CASE

The facts of this case are – one hopes – unique. The principles involved are not. The decision below raises squarely a question of increasing confusion in the lower courts: What exactly constitutes a "generalized grievance" for standing purposes? Petitioners argue that state violations of individual rights under the federal constitution are amenable to federal court review even – if not especially – when widespread. Respondents assert that where such violations are so widespread as to be an integral part of how that state government operates, "federal courts cannot interfere with a state's freedom to structure its governmental processes."[1] This case thus goes to the core of our federal system and our federal Constitution.

This action arises from an alleged scheme by the Respondents to trade a massive pay-raise for desired decisions by the state Supreme Court. Those decisions, in cases in which the Petitioners here were litigants, concerned state constitutional provisions ensuring public knowledge of and participation in the legislative process. The legislative leadership wanted the judiciary to ignore these constitutional restraints on its activities; the judiciary wanted more money (for that matter, so did the legislators). It was a match made in Harrisburg.

Petitioners contend that these actions violated not some generalized, abstract duty of good government,

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[1] Brief for Appellees Senate President Pro Tempore and Senate Majority Leader at 23, *Common Cause of Pa. v. Commwealth*, 558 F.3d 249 (3rd Cir. 2009) (No. 06-3391).

but their specific, individual, federal constitutional rights: (1) to unbiased state court adjudication of their then-pending and imminent state lawsuits, under the Due Process Clause; (2) to equal representation in the legislature, under the Equal Protection Clause; and (3) to petition the state government, under the Petition Clause.

1. A history of trading money for court rulings to shut the public out of the legislative process

In 1987, the Pennsylvania Supreme Court held that the Pennsylvania Constitution required the state government to fund Courts of Common Pleas, previously funded by individual counties. The General Assembly, however, declined for roughly a decade to comply, until the Court was inadvertently handed some unexpected leverage.

Article III of the Pennsylvania Constitution spells out the required enactment process for legislation in painstaking detail, *see* PA. CONST. art. III. In 1995, the General Assembly began regularly enacting legislation in ways that preclude involvement in the legislative process by both the public and the vast majority of legislators in contravention of the foregoing state constitutional requirements. Besides presenting serious questions of propriety under the *state* constitution, Petitioners contend that this process establishes a two-class legislature in violation of their right to equal protection because many members are denied an essential incident of legislative membership – the right to propose legislative language.

Numerous parties – including Petitioners here, Common Cause and the League of Women Voters – repeatedly sued the state legislative leadership in state court, challenging the validity of various laws enacted in accordance with these procedures.[2] In 1996 through 1999 – with *Common Cause I, AFL-CIO,* and *Common Cause II, supra* n.2, then pending before the state Supreme Court – the General Assembly leadership negotiated directly with justices of the Pennsylvania Supreme Court over funding of the court system. According to sworn affidavits from a legislator and Common Cause staff who interviewed numerous other legislators, incorporated into the Second Amended Complaint, the justices threatened the legislative leaders that these cases would be decided against the legislative leaders unless the long-demanded court funding was approved by the General Assembly. The legislators initially rejected these overtures. The Pennsylvania Supreme Court shortly thereafter found the entire state budget unconstitutional, in *Common Cause I.* Subsequent negotiations resulted in the General Assembly enacting legislation to fund the county courts. The Court then upheld the legislation challenged in *AFL-CIO* and *Common Cause II.*

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[2] *See Common Cause of Pa. v. Commonwealth*, 668 A.2d 190 (Pa. Commw. Ct. 1995), *aff'd*, 544 Pa. 512, 677 A.2d 1206 (1996); *League of Women Voters v. Commonwealth*, 683 A.2d 685 (Pa. Commw. Ct. 1996); *League of Women Voters of Pa. v. Commonwealth*, 692 A.2d 263, 270 (Pa. Commw. Ct. 1997); *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023 (Pa. Commw. Ct. 1997), *aff'd*, 757 A.2d 917 (Pa. 2000) ("*AFL-CIO*"); *Common Cause of Pa. v. Commonwealth*, 710 A.2d 108 (Pa. Commw. Ct. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000) ("*Common Cause II*").

2. The enactment of Act 44

At some point in 2004 or 2005, the Chief Justice of the Pennsylvania Supreme Court initiated further secret negotiations with state legislative leaders for the enactment of a bill increasing the salaries of the Commonwealth's judges and justices. Eventually, the contemplated pay hike was expanded to include legislators and high-level executive branch employees.

House Bill 1521, which would become Act 44, was initially a 24-line bill that prohibited any executive official from receiving higher compensation than the Governor. After minor amendments in the Senate the bill was referred to a conference committee consisting of most of the General Assembly's leadership. Petitioners allege that Respondents suppressed introduction of *any* pay-raise legislation throughout the legislative session and worked actively to ensure that the public generally, and these Petitioners specifically, never had any notice that the General Assembly would so much as consider pay-raise legislation at any point. At approximately 2:00 a.m. on July 7, 2005, the conference committee amended HB 1521, changing it into a 22 page bill providing for massive increases of up to 54% in the salary of every justice and judge, every member of the General Assembly, and senior members of the executive branch including the Governor and members of his Cabinet. No amendments were allowed to the leadership's complete redraft, which was quickly passed. The Governor signed it into law early that morning, and it immediately took effect.

3. Reaction to Act 44

With considerable understatement, the Pennsylvania Supreme Court has noted, "There was a negative public response to [Act 44], focusing particularly upon its timing and method of passage." *Stilp v. Commonwealth*, 905 A.2d 918, 925 (Pa. 2006). The Chief Justice was less understated in his public defense of both the Act and his backroom involvement in crafting it – which he revealed at that time in newspaper op/ed pieces and interviews – and in his denunciations of the Act's critics.[3]

Due to the negative reaction, the General Assembly, on November 16, 2005, repealed Act 44 "in its entirety" and reinstated the previous pay schedule for all state officials ("Act 72"). Because Act 72 purported to repeal Act 44, the district court in this litigation held that Petitioners' claims regarding Act 44 were moot. *See Common Cause of Pa. v. Commonwealth*, 447 F. Supp. 2d 415, 424 (M.D. Pa. 2006), App. at 54a-58a. A citizen not a party to this action brought a *pro se* state-court challenge to Act 44, however, while state court judges brought suit to overturn Act 72's repeal of Act 44. The Pennsylvania Supreme Court ultimately upheld the passage of Act 44 by relying on the allegedly-"fixed" precedents of *Common Cause II* and *AFL-CIO*, *supra*, and struck down its repeal by Act 72 as itself unconstitutional insofar as it decreased judges' salaries, *Stilp*, 905 A.2d at 939, 949, holding that "Act 44's provisions ... which

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[3] *See, e.g.*, Bumsted, "Cappy's indefensible defense," *Pittsburgh Tribune* (July 24, 2005); Reiland, "Giveaway Governance," *The American Spectator* (Aug. 9, 2005).

relate solely to the formula to determine compensation paid to the Judiciary, remain in force." *Id.* at 981.

No state court action was brought by Petitioners here, for the simple reason that they believed, on the basis of both prior experiences, *supra*, and contemporaneous reports, that the result of any such litigation had been "fixed" in advance as part of the pay-raise deal and they did not want to preclude their right to federal review under the *Rooker-Feldman* doctrine.

Ten months later, the Pennsylvania legislature enacted a third statute, Act 30, which gave judges a one-dollar raise from whatever were their lawful salaries as of that date (i.e. if Act 44's enactment was unlawful, then judicial salaries on that date – and thus today, as well – would be automatically lower than if Act 44's enactment were upheld here). The net result is that Act 44's increase in judicial salaries has been made permanent. In addition, all legislators and judges will continue to receive substantially increased *pension* payments *permanently* due to Act 44. The increased salaries paid out under Act 44 (for several months to legislators and for several years to judges) have never been recouped, either. Thus, in purely monetary terms, even if since repealed or replaced, Act 44 had – and *continues* to have – various effects that have never been remedied. Of course, Petitioners allege primarily not monetary injuries but rather the denial of their right to due process from the "fixing" of cases, the denial of equal representation in the legislature, and the denial of their rights under the First Amendment during the enactment of Act 44. None of these constitutional injuries has been remedied, either, and the harm continues to this day.

4. Procedural posture of this litigation

Petitioners initiated this federal litigation on October 6, 2005. The district court possessed jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). In their Second Amended Complaint, Petitioners alleged that the state legislature and state Supreme Court had negotiated in 1999 to "sell" disposition of the cases involving Petitioners in return for appropriations to fund the county courts, *supra*. The Second Amended Complaint alleged and included supporting evidence suggesting that something similar occurred as to the passage and content of Act 44, as well, *i.e.* that the Pennsylvania courts bartered their decisions for a pay raise, violating the due process rights of litigants including Petitioners.

In the course of this litigation, Petitioners have learned, and advised the courts, of concrete allegations by various legislators that: (a) the Chief Justice asserted during the secret negotiations over Act 44 that "he needed the pay-raise in order to secure the votes of Republican justices on cases important to" the legislative leaders, and (b) the pay-raise was part of a deal to secure a favorable ruling on a similar then-pending challenge to the state's slot machine law, *Pennsylvanians Against Gambling Expansion Fund et al. v. Commonwealth of Pa. et al.*, 877 A.2d 383, 583 Pa. 275 (2005) (hereinafter, "*PAGE*"), in which two Petitioners – the League of Women Voters and state Representative Greg Vitali – were plaintiffs.

Respondents moved to dismiss all of Petitioners' claims, under Fed. R. Civ. P. 12(b)(1) and (6), for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. On June 12,

2006, the district court granted the motions to dismiss, finding that the case was moot, and Petitioners lacked standing *and* failed to state a claim. *Common Cause*, 447 F. Supp.2d at 419, 431 n.14, 438.

Petitioners appealed to the Third Circuit. Nearly seven months after oral argument, the merits panel recused itself, as did all other judges of the Third Circuit, and the court ordered the transfer of the case to a panel of judges from outside the Circuit. A second oral argument then was held before that inter-circuit panel. On February 26, 2009, the inter-circuit panel affirmed the order of the District Court, holding that Petitioners lacked standing.

The inter-circuit panel interpreted all of Petitioners' claims as "generalized grievances": "Plaintiffs are asserting only a generalized, abstract grievance held by 'all Pennsylvanians.' Plaintiffs have, thus, failed to allege that they have directly suffered a personalized, actual or imminent injury, as Article III requires." *Common Cause of Pa. v. Commonwealth*, 558 F.3d 249, 263 (3rd Cir. 2009), App. at 27a; *id.* at 262, App. at 25a (due process) ("a generalized, abstract grievance shared by all Pennsylvania citizens"); *id.* at 268, App. at 38a (equal protection) ("only a generalized, abstract grievance shared by most Pennsylvanians"); *id.* at 269, App. at 40a ("only a general, abstract grievance shared by all Pennsylvanians"); *id.* at 270, App. at 42a (First Amendment) ("only generalized, abstract grievances held by all Pennsylvanians").

The panel, like the district court, interpreted Petitioners' challenge to the Chief Justice negotiating a pay increase for himself and his colleagues in return

for desired court rulings as a challenge to *the legislative* process. *Id.* at 262. Petitioners have always contended, however, that the problem with this deal-making is that it corrupted the *judicial* process, not the legislative process, hence violating due process.[4] The panel opinion therefore proffered a second rationale for denying standing on the claims of judicial corruption: "Plaintiffs do not allege that they ever challenged Act 44 in state court and that, in doing so, they were deprived of an impartial decisionmaker.

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[4] While the panel opinion asserts that, "For the first time on appeal, Plaintiffs attempt to focus on the potential state judicial process," this is clearly not true: The panel's own summary of the Complaint notes, "Plaintiffs allege that, for the past ten years, members of the Pennsylvania Supreme Court have traded judicial decisions favorable to the Pennsylvania General Assembly in return for the legislature's funding the state judiciary. According to Plaintiffs, this arrangement culminated in the General Assembly's enactment of Act 44 in a sleight-of-hand manner during the dead of night." *Id.* at 253, App. at 4a. *See also* Second Amended Complaint at 4 ("barter[ing] [of] votes on cases"); *id.* at 7-8 ("judicial/legislative compact ... has corrupted state constitutional case law on Article III [of the Pennsylvania constitution] at issue in this case, as well as cases pending in state courts"), and ¶¶ 2(a) ("legislative action desired by the Court was and potentially still is secured in exchange for judicial decisions desired by the legislative leaders"), 143 & 147 ("illegally negotiated legislative outcomes desired by named, known and unknown members of the Pennsylvania Supreme Court in exchange for decisions by the Pennsylvania Supreme Court"). The evidence of the alleged case-fixing need not be pled, of course, and the specifics offered by Petitioners during the course of this litigation, consistent with the pleadings, demonstrate reasonable inferences that the reviewing court can, in fact *must*, draw, and may be used to show that the complaint should not have been dismissed on its face. *See Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 914-15 (7th Cir. 1985); *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 247 (3rd Cir. 1989).

Instead, they allege, in the abstract, that if Plaintiffs had brought suit in Pennsylvania courts challenging Act 44, they would not have had an impartial decisionmaker: That is not sufficient to state the actual or imminent injury necessary for constitutional standing." *Id. at* 263, App. at 26a.

Petitioners sought both *en banc* and panel rehearing but the inter-circuit panel denied the rehearing petition, denominating it a petition for panel rehearing *only*, because all Third Circuit judges had disqualified themselves from the case so that rehearing *en banc* was not possible.

REASONS FOR GRANTING THE PETITION

There are three inter-related reasons for granting this petition:

(1) The decision below clearly misinterprets what this Court means by a "generalized grievance" under the U.S. Constitution.

(2) The decision below is not alone in misunderstanding this aspect of standing jurisprudence but rather represents growing confusion in the lower courts about its meaning and application; because of the range of claims and plaintiffs here, moreover, this case provides perhaps the best possible vehicle for this Court to clarify the law in this area.

(3) Clarifying and correcting this misinterpretation is of vital importance, beyond this particular case, to the maintenance of existing constitutional rights, our federal system, and judicial integrity.

I. THE DECISION OF THE INTER-CIRCUIT PANEL CONFLICTS WITH THIS COURT'S STANDING JURISPRUDENCE

A. The Inter-circuit Panel Opinion Misunderstands the Nature of a "Generalized Grievance" for Purposes of Standing

The constitutional requirement of standing demands that plaintiffs identify a concrete, legally cognizable injury suffered *by them*, as opposed to an abstract interest or "generalized grievance" that does not cause actual legal injury to the litigant, such as being offended by the government's failure to comply with a constitutional provision affecting others[5] or that one shares *in gross* with all other citizens.[6]

"Generalized grievance" is thus a term of art – if a vague and potentially misunderstood one. By "generalized grievance," the Supreme Court has *never* meant that an injury broadly shared deprives any or all potential litigants of standing.

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[5] *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (describing assertion of Eighth Amendment rights of others as generalized grievance); *United States v. Hays*, 515 U.S. 737, 745 (1995) (describing assertion of equal protection rights of others as generalized grievance).

[6] *E.g.*, the Accounting Clause, U.S. CONST. art. I, sec. 9, cl. 7, *see United States v. Richardson*, 418 U.S. 166 (1974); the Incompatability Clause, U.S. CONST. art. I, sec. 6, cl. 2, *see Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); the Taxing & Spending Clause, U.S. CONST. art. I, sec. 8, cl. 1, *see Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

But that is the basis on which the inter-circuit panel decision dismisses all three of the constitutional claims in this case. The decision is therefore in contravention of settled Supreme Court precedent. As leading constitutional scholar Erwin Chemerinsky has written at length on precisely this point:

> The term generalized grievance is confusing because it implies that no one would have standing to challenge a blatantly unconstitutional law applicable to everyone in the country. For example, would it be a generalized grievance, and everyone denied the ability to sue, if Congress were to adopt a law prohibiting all religious worship? The answer is clearly that standing would exist in such an instance to challenge the denial of free exercise of religion even though it would be an injury shared in substantially equal measure by all or a large class of citizens. In fact, the Court has explained "[n]or...could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review...any person who had in fact suffered injury...To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Governmental actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-688 (1973). [Hereinafter, *SCRAP*.]

Thus, the existence of a generalized grievance is not determined simply by the number of people affected. Rather, a generalized grievance is

> where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures.
>
> In other words, the bar against generalized grievance standing is inapplicable if a person claims that he or she has been denied freedom of speech or due process of law, even if everyone else in society has suffered the same harm.

Chemerinsky, FEDERAL JURISDICTION (5th ed. 2007), pp 91-92.

These, in fact, are precisely Petitioners' claims: that *their* due process rights were violated by the corruption of cases in which *they* were litigants (or the intended litigants); that *their* equal protection rights were violated by being subjected to representation by legislators not accorded the minimum incidents of legislative membership; and that *their* First Amendment rights were violated by state actors who actively suppressed public knowledge and *their* opportunity to be heard. And it is well-established that no matter how many millions of others may suffer the exact same injury, if the harm is cognizable the injured individual possesses standing. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998); *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 n.24 (2007) ("standing is not to be denied simply because many people suffer the same injury."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992) (not a generalized grievance when "concrete injury has been suffered by many persons, as in mass fraud or mass tort situations").

In sum, the standing inquiry does not and cannot rest on the question whether the alleged injury is shared equally by virtually every single individual within the jurisdiction (or, for that matter, as this Court has ruled, by every single individual on the face of the planet, *see Massachusetts v. E.P.A.*, 549 U.S. at 517). This is not what the Court means by "generalized grievance." The question as to whether plaintiffs possess standing is whether they allege an injury that is *legally cognizable*, regardless of how many millions, or even billions, of others sustained exactly the same injury.

Rather, as Professor Chemerinsky has noted, "The Court draws a distinction between constitutional provisions creating individual rights – such as the equal protection clause – the violation of which creates standing, and provisions pertaining to the structure of government – such as the statements and accounts clause – the violation of which is a generalized grievance." E. Chemerinsky, *op. cit.*, at 99. The inter-circuit panel opinion obliterates this distinction. It thus conflicts with this Court's well-settled standing jurisprudence.

B. The Inter-circuit Panel Opinion Conflicts with Well-Settled Supreme Court Precedent that Plaintiffs Need Merely Plead, and not Prove, Their Factual Assertions at the Pleadings Stage, Even as to Their Standing to Sue

Under the due process claims in this case, Petitioners assert not merely that they are "offended," but that they suffered an undisputedly cognizable injury: the "fixing" of their cases.

There can be no doubt that a litigant's right to due process is violated if the case in which they are a party has been "fixed." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) ("A judge who accepts bribes . . . to fix [a] case is 'biased' in the most basic sense of that word.... [which] would violate the Due Process Clause of the Fourteenth Amendment."). And, of course, as the panel opinion below concedes, "[b]ecause the district court dismissed plaintiff's claims pursuant to Fed.R.Civ.P. 12(b)(1) and (6),...we must accept as true all well-pled allegations and construe the complaint in the light most favorable to the plaintiffs." *Common Cause*, 558 F.3d at 255, App. at 4a-5a.

The opinion below therefore retreats to a secondary position asserting that "Plaintiffs do not allege that they ever challenged Act 44 in state court and that, in doing so, they were deprived of an impartial decision-maker. Instead, they allege, in the abstract, that if Plaintiffs had brought suit in Pennsylvania courts challenging Act 44, they would not have had an impartial decision-maker." *Id.* at 263, App. at 26a. *See also id.* ("not sufficient[ly] actual or imminent"). This imposes a pleading requirement inconsistent with well-established doctrine and misstates the law of standing established by this Court.

First, Petitioners contend that the injury in fact occurred – and was thus fully realized – at the time of the agreement to "fix" the impending litigation. The agreement itself deprived plaintiffs, then and there, of a fair state court system to hear their challenge to Act 44. The violation of due process here is *not* hypothetical or conjectural – it *already occurred*.

Second, asserting Petitioners' state-law claims before a biased state decision-maker would not only have required Petitioners to submit to the deprivation they had a right to avoid: It also would have required them to forfeit their right to direct review in a *federal* forum of their claims for deprivation of *federal* rights. A litigant needn't choose "between abandoning his right or risking [its violation]." *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982) (plaintiffs possessed standing despite not applying for permit because permit would not have been granted and application would have been futile).

Third, Petitioners need demonstrate only that it is *likely* that they would have brought a case had it not been "pre-fixed." *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7, n.8, 108 (1983); *Massachusetts v. E.P.A., supra*. *Cf. Clements v. Fashing*, 457 U.S. 957, 962 (1982) (where plaintiffs alleged that they would have announced their candidacy were it not for the consequences of doing so, Court rejected defense that dispute was "merely hypothetical" and that allegations were insufficient to create an "actual case or controversy."); *Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 505 U.S. 656, 664-65 (1993).

Petitioners here have demonstrated that they have brought such suits in the past, *see, e.g.* Complaint, App. 26 & ¶¶ 32-35 (discussion of *Common Cause I*), ¶¶ 37-45 (*Common Cause II*). *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (plaintiffs had standing to challenge alleged harmful environmental conduct because *they had used*

the affected land in the past); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211-12 (1995) (pattern of past involvement and stated intention to participate in future combined to give plaintiff standing). They have shown that they likely would have done so again this time – because they *did* sue (they just did so in the forum that *preserved*, rather than *destroyed*, their federal claims). Not only would these plaintiffs likely bring suit to challenge Act 44 – they, and not the public generally, are *precisely the plaintiffs the defendants expected and whose litigation they agreed to fix*.

Fourth and finally, Petitioners need not *prove* any of these contentions to establish standing at this stage. *Lujan*, 504 U.S. at 561-62. The panel relies on cases in which plaintiffs' standing theories were dismissed as "hypothetical" or "conjectural" at the summary or final judgment stage – where unsubstantiated and unproven assertions are *never* sufficient to meet a party's burden of proof. *Id.* At the pleadings stage, however, plaintiffs are specifically entitled to the assumption that their allegations are *true* – *not* conjectural. *See SCRAP, supra,* 412 U. S. 669, 689 & n.15 (1973), and *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990) (describing allegations in *SCRAP* as "sufficient to withstand a motion to dismiss, because the plaintiffs ... may have been able to show at trial that the string of occurrences alleged would happen immediately"). As this Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff is not required to set forth "detailed factual allegations" in order to survive a motion to dismiss. *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). To survive a motion to dismiss, a complaint must merely contain sufficient factual matter, accepted by the court

as true, to "state a claim to relief that is plausible on its face." *Id.* at 570.

By rejecting the Petitioners' averments that they would have invoked the state courts' jurisdiction but for the fact that any Act 44 litigation had *already been fixed against them*, thereby denying them their right to a fair court system in violation of due process, the opinion below imposes a proof requirement on plaintiffs at the pleading stage inconsistent with well-settled precedent as to both the law of pleading and the law of standing.

II. THE INTER-CIRCUIT PANEL OPINION REFLECTS THE GROWING CONFLICT AND CONFUSION IN THE CIRCUITS OVER THE SWEEP OF THE "GENERALIZED GRIEVANCE" DOCTRINE

Despite the clarity of the concepts summarized *supra*, Section I.A, much like other legal terms-of-art such as "actual malice" the everyday-sense of the words "generalized grievance" may not convey the actual meaning of the legal term.

The lower courts therefore appear to be increasingly confused in their understanding of what constitutes such "generalized grievances," for two reasons: The first is this Court's own application of the concept to two radically different situations – cases involving provisions creating "*in gross*," not individual, rights, on the one hand, and instances better characterized simply as attempts at third-party

standing,[7] on the other. The second is the increased recent use by this Court of the "generalized grievance" doctrine[8] in ways that the lower courts are misapplying to individual-rights cases. The decision below represents the culmination of this trend, and ripens the conflict amongst the circuits.

The inter-circuit panel's decision places the Third Circuit in conflict with the jurisprudence of a majority of circuits correctly interpreting the "generalized grievance" doctrine not to apply to individual-rights claims, no matter how widespread the injury or potential injury. *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) (cap on political expenditures, violating First Amendment rights of all New Hampshire citizens, nonetheless constitutes "sufficiently particularized grievance" to confer standing); *Ad Hoc*

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[7] *E.g., United States v. Hays*, *supra*, states that "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other," 515 U.S. at 743, but it clearly means this in the context of whether an individual can challenge the violation of a third party's rights, ultimately holding that *everyone* in a racially gerrymandered district – a quarter-million similarly-affected individuals – has standing. *Id.* at 745.

[8] The "generalized grievance" doctrine received mention by this Court seventeen times through October 1995, about half of those since 1980, *see* Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievance as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1864–65 n.11 (1996). In contrast, in the last seven years the Court has discussed the doctrine at least five times: *Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345–46 (2006); *Lance v. Coffman*, *supra* (2007) (per curiam); and *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist., 873 F.2d 25, 29 (2d Cir. 1989) (claim of discrimination affecting broad class "not an abstract concern or 'generalized grievance'" because plaintiffs "are asserting their own right to [be] free of racial discrimination"); *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) ("direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct"); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 196 (5th Cir. 2006) (same); *Walker v. City of Mesquite*, 169 F.3d 973, 979-80 (5th Cir. 1999) (wide class of homeowners zoned for public housing because of their race possesses standing because being racially classified "is an injury in and of itself"); *Cuidados Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807 (5th Cir. 1980) (individual Mexican-Americans possessed standing to challenge systematic exclusion from grand jury service of Mexican-Americans generally); *O'Hair v. White*, 675 F.2d 680, 689 (5th Cir. 1982) ("grievance is not a generalized one shared by all citizens" because it "is a specific restriction on [plaintiff's] ability to vote" – although also on that of every other Texan); *Wesley v. Collins*, 791 F.2d 1255, 1258 (6th Cir. 1986) (individual felon has standing to bring equal protection right-to-vote claim even where "all convicted felons are disenfranchised"); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (standing to bring Establishment Clause challenge even where virtually all citizens exposed to city's official use of religious symbols); *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993) (per curiam), *affg* "for the reasons set forth in" 813 F.Supp. 821, 826-27 (N.D. Ga. 1993) ("This is more than a generalized grievance about

Georgia's conduct of government; this is an assertion that they are being denied the full scope of their individualized right to vote").

This "conflict" might be easily dismissed by this Court as the result of one aberrant panel opinion if that were the case. But it is not. For instance, in a case presenting a similar claim to one here, *Public Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2002), plaintiffs challenged the Texas system of judicial campaign contribution as violating their due process rights by presenting the appearance of corruption in the courtroom; however, unlike in this matter (where Petitioners claim specifically that cases in which *they* were litigants were corrupted by Respondents), the Fifth Circuit found that plaintiffs never asserted that contributions were made to judges by opponents in cases in which they were litigants. The plaintiffs therefore, while pleading an individuated injury, failed to allege that the injury-in-fact was actual or imminent. The Fifth Circuit, however, erroneously construed this as "present[ing] a generalized grievance." *Id.* at 219. In *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002), plaintiff claimed a violation of his First Amendment right to receive information, affecting his Fourteenth Amendment right to vote, due to a restriction on the descriptions allowed on the ballot of a candidate's occupation; the Ninth Circuit denied standing on the claim as a "generalized grievance" that "alleged an abstract interest common to all members of the public." *Id.* at 1020. Similarly, in *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir 1999), plaintiffs brought a First Amendment and equal protection challenge to Georgia's campaign contribution system; after essentially ruling against

plaintiffs on the merits, *id.* at 1263-64, the court held that plaintiffs failed to make out an injury-in-fact because the injuries "consist of the type of abstract and indefinite generalized grievance shared in substantial measure by all citizens." *Id.* at n.2. In sum, the inter-circuit panel here is not the first circuit court to confuse allegations of widespread injury to individual rights with a non-justiciable "generalized grievance."

The inter-circuit confusion and conflict has become markedly more severe, however, in the mere two years since this Court's opinion in *Lance v. Coffman*, 549 U.S. 347 (2007) (per curiam), where the Court applied the "generalized grievance" standard to a challenge to state action alleged to violate the Elections Clause, art. I, §4, cl. 1. The confusion has been particularly acute in the area specifically addressed in *Coffman* to distinguish its own holding – that of voting.

For instance, in contrast to the ruling here, in *Bishop v. Bartlett*, No. 07-1840, 2009 WL 2341984 (4th Cir. July 29, 2009), the Fourth Circuit held clearly and correctly that "the fact that the deprivation of Moore's right to vote ... was shared by all residents of the city does not necessarily mean that his injury is merely a 'generalized grievance.' ... [T]he deprivation of Moore's right to vote ... satisfies the injury-in-fact requirement." *Id.* at *3-4.

But in *Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 900 (8th Cir. 2007), the Eighth Circuit denied standing on plaintiffs' claim that the state government violated their substantive due process rights to a meaningful vote in an election – which, if correct, clearly constitutes an infringement of an individuated right – while declining to apply the

same analysis to and disposing on other grounds of a claim for denial of the similarly individualized "fundamental right to vote." In *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1334 n.8 (11th Cir. 2007), the Eleventh Circuit was at pains to distinguish "claimed violations of the Intervenors' 'constitutional and voting rights'" – which constitute "a generalized grievance shared in common by all voters in Chilton County" – from "a claim of violation of the Intervenors' personally held rights under the Equal Protection Clause of the Fourteenth Amendment," which, although also shared by all voters (though not perhaps *in common*), would have been actionable. Unlike the instant case, this is the correct analysis – but, at the end of the day, the court's basis for treating the two similar claims differently under the "generalized grievance" doctrine is left unclear. And in *Johnson v. Bredesen*, Nos. 08-6013, 08-6106, 2009 WL 2251301 (6th Cir. July 28, 2009), the Sixth Circuit rejected an argument similar to that accepted by the Eleventh Circuit in *Public Citizen, Inc. v. Miller*, *supra*, that plaintiffs' personal rights to vote and to become a candidate had been violated, by depending explicitly on *Coffman* for the proposition that such a claim constitutes a "generalized grievance." *Id.* at *4.

It is not surprising, therefore, that the district court in the same case confessed: "Defendants may be right that the claim is a generalized grievance about the conduct of government. ... On the other hand, to the extent that Plaintiffs claim their constitutional right to vote has been infringed by the Tennessee Plan, the claim seems less like a generalized grievance. ... [I]t is not clear that cases where voters' constitutional rights have potentially been infringed are generalized grievances." *Johnson v. Bredesen*, Nos. 07-0372, 07-

0373, 2008 WL 701584, at *4 (M.D. Tenn. Mar. 13, 2008), *aff'd* 2009 WL 2251301 (6th Cir. July 28, 2009).

The inter-circuit panel's decision below is the most direct statement of this conflict to date. The inter-circuit panel found that Petitioners alleging violations of their *own* First and Fourteenth Amendment rights – as litigants in "fixed" cases, as constituents afforded less-than-full representation in the legislature, and as individuals denied the right to petition the legislature, all well-established "individualized" and "particularized" injuries – nonetheless lacked standing *because* "'all Pennsylvanians,'" *Common Cause, supra*, 558 F.3d at 263, App. at 27a, potentially suffered the same or similar injuries.

In sum, the lower courts are split between those who recognize that plaintiffs alleging violations of individual constitutional rights have standing no matter how many others may be similarly injured; those who do not; and those who simply do not know or are struggling to draw the distinction. In this confused and conflicted environment, the inter-circuit panel opinion in this case is likely to infect the jurisprudence of more circuits than decisions by normal court of appeals panels: The decision below is the clearest, simplest and most forceful statement to date of the erroneous view that widespread violations of even the clearly individualized provisions of the Bill of Rights are simply non-justiciable. In addition, while representing the Third Circuit, the panel was assembled from the Second, Seventh, and Tenth Circuits; it thus carries the rare distinction of standing as precedent in one circuit while representing the views of judges from three others.

This case also provides a singular opportunity for the Court to clarify the conditions under which plaintiffs alleging injury under the individual rights provisions of the Constitution have standing to bring such suits: It involves violations of various individual rights across a full spectrum of plaintiffs – from individual litigants in "fixed" cases (which constitute a definable universe) and individuals distinctly concerned with following and petitioning their state legislature (while individuals, a potentially unlimited class), to members of a substantial class of disfranchised voters approaching nearly (but not quite all) voters in the state – all injured individually but potentially in common with millions of other individuals. It is thus the single best possible vehicle for delineating the proper extent of the "generalized grievance" doctrine.

The decision below thus uniquely merits and requires the review and correction of the Supreme Court.

III. THIS CASE PRESENTS ISSUES OF GREAT CONSTITUTIONAL AND PUBLIC IMPORTANCE

A. By Barring Constitutional Claims in Which Large Numbers of Individuals Suffer Personal Injury, the Decision and Those Like It Threaten to Curtail Protection of Established Rights

If the inter-circuit panel opinion in this case were the Law of the Land, it would bar *all* constitutional litigation involving claims shared by large numbers of litigants – regardless of whether the claim is one

involving a constitutional provision implicating all citizens' "rights" *in gross* or one involving the individual rights protected by the Bill of Rights and held by all Americans individually.[9] This would include, by definition, most large-scale discrimination cases under the Equal Protection Clause – including virtually *all* voting rights cases; all facial challenges to statutes under the First Amendment; and, as in this case, corruption of the judicial process affecting or potentially affecting the litigation of not just a single litigant but dozens if not millions.

As this Court has declared, "our equal protection jurisprudence has typically been concerned with governmental classifications" concerning "*groups* of citizens." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. ___, ___, 128 S.Ct. 2146, 2147 (2008) (emphasis added). *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals"). In fact, historically, equal protection claims have often involved large numbers – perhaps millions – of individuals affected unfairly in exactly the same manner by the same governmental action. In short, it is clear that equal protection claims are not invalid as

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[9] On this distinction, *see generally*, Schnurer, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 586 (1986) ("In tracing the Court's jurisprudence, a distinction must be drawn between the treatment of those interests held in personam – in the sense that a governmental infringement of one person's rights does not necessarily infringe another's – and those held by the public in gross – rights inherently shared in that a governmental infringement of any person's rights necessarily infringes the same right of *all* people.").

representing a "generalized grievance" when shared by large numbers, because they generally do so. The panel wrongly denied standing to allege denial of equal representation in the legislature specifically because this injury was shared by most (though not all) Pennsylvanians.

The panel's ruling would essentially bar all broad class-based equal protection challenges, virtually wiping out equal protection litigation, including voting rights cases. Thus, in *United States v. Hays,* 515 U.S. at 745, while the Court "reject[ed] [the] position that 'anybody in the State has a claim'" when denials of equal protection occur, the Court nonetheless affirmed that "[a]ny citizen able to demonstrate that he or she, personally, has been injured by [a] ...classification has standing to challenge the classification in federal court" – and that is true regardless of how many citizens that includes. In fact, as the Court recognized, it will include, as here, every single citizen in the actually-affected legislative district. *Id.* at 746. *See also Bush v. Vera*, 517 U.S. 952, 957-58 (1996). In the font of all representation claims, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962), this meant that the vast majority of voters in the state ("all qualified voters ... of the State of Tennessee who are similarly situated," *id.* at 204-05) possessed standing – as here.

Lance v. Coffman, *supra*, relied upon by the panel below, makes this distinction: "The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. *It is quite different from the sorts of injuries alleged by plaintiffs*

in voting rights cases where we have found standing." *Id.* 549 U.S. at 442 (citing *Baker v. Carr, supra*) (emphasis added). The Court's contrast of *Coffman* with the voting rights cases is quite telling: In the latter, *everyone* in the affected jurisdiction is harmed identically, by the same injury alleged here – and all possess standing. If this weren't true, there could never be *any* of the voting rights cases. In fact, most major civil rights cases, involving widespread and equally-shared injury, could be wrongly reclassified as "generalized grievances" and prohibited under the panel opinion. It must be reversed.

The panel decision also bars litigation of First Amendment claims if widely shared – which is the case with *all* facial challenges, and many others, under the First Amendment. This would therefore overturn countless well-established precedents. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (all citizens prohibited from teaching German); *Mills v. Alabama*, 384 U.S. 214 (1966) (all citizens prohibited from discussing a political candidate); *Stromberg v. California*, 283 U.S. 359 (1931) (all citizens prohibited from flying a red flag); *Buckley v. Valeo*, 424 U.S. 1 (1976) (campaign contributions of all citizens restricted), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (Alien and Sedition Act, restricting speech of all Americans, unconstitutional).

Systematic due process violations, despite by their nature involving concrete violations of individual rights, also would be rendered uncognizable by the inter-circuit panel's opinion. The panel opinion's focus on Petitioners' contention that the corruption of the judicial system does, and was intended to, deprive *all* Pennsylvanians of due process of law obscures the real

question – which is whether, regardless of the universality of the deprivation intended by the Respondents, these specific plaintiffs suffered a legally cognizable injury *themselves*. It is clear that, if such case-fixing occurred, and plaintiffs can establish that they were affected as litigants in such cases, their rights to due process of law have been violated, and they have standing so to assert, regardless of how many others may have been similarly affected. *Bracy v. Gramley*, 520 U.S. at 904-05 (1997).

These plaintiffs have consistently claimed in this case to have been the object of such case-fixing in the past and to have been precisely the likely litigants whom the Respondents had in mind when they plotted to ensure that no litigants would succeed in challenging Act 44 of 2005. As the Third Circuit recently noted elsewhere, a case does not constitute a "generally available grievance" where the plaintiff "claims to be the specific *target* of the defendants' challenged" conduct. *Toll Bros. v. Twp. of Readington*, 553 F.3d 131, 144 (3rd Cir. 2009) (citing A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 894 (1983) ("when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing")) (emphasis in originals).

In sum, the ruling below would not only produce the perverse result of making constitutional violations less redressable the more constitutional rights are trampled upon: It would also render great swaths of civil rights litigation with a long and noble history in federal court suddenly non-justiciable. It merits Supreme Court review.

B. Broader, Important Public Issues and Public Values – and the Role of Federal Courts in Addressing Them – are at Stake in This Case

The underlying issues in this case – and whether there is anything that federal courts can do about them – go to the heart of our identity as a people and a nation. The allegations in this case involve a state government where judges regularly meet *ex parte* with other members of the government to decide how to interpret the state constitution, and agree to do so in return for money, in ways that allow the political branches to operate in secret, excluding not just the public but most of their elected representatives from any meaningful participation. These allegations are shocking if true – and they come not merely from the citizen-litigants in this case (including widely respected *national* groups) but also from legislators who have participated in and witnessed these activities. They are also proper – indeed, *compelling* – subjects for federal court intervention.

As this Court observed just last Term, "extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated. *See, e.g., County of Sacramento v. Lewis*, 523 U. S. 833, 846-47 (1998) (reiterating the due-process prohibition on 'executive abuse of power . . . which shocks the conscience')." *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, ___, 129 S.Ct. 2252, 2265 (June 8, 2009).

Judicial corruption clearly undermines due process of law. *Bracy v. Gramley*, *supra*. Other state courts

have recognized this basic principle. *People v. Hawkins*, 181 Ill.2d 41, 51-52 (1998) (since judge "traded verdicts for bribes," he "possessed and actively cultivated a personal, pecuniary interest in the outcome" and therefore "defendants did not receive a fair trial"); *State v. Benson*, 973 S.W.2d 202, 206 (Tenn. 1998) ("bribery solicitation, if proven, would constitute the denial of the petitioner's fundamental constitutional right to a fair trial before an impartial judge"). But where, as here, the potential corruption involves the state's highest bench, the protective powers of the federal judiciary are required. Federal judicial intrusion is at its most defensible when it is to assure judicial integrity.

The Petitioners in this case also challenge legislative procedures that they argue create a two-class legislature, in which some legislators (and thus their constituents) are stripped of some of the irreducible minima of legislative membership and participation, in violation of equal protection. The exact procedures utilized were invented in Pennsylvania approximately 20 years ago, in contravention of the understanding of the drafters of Pennsylvania's Constitution of 1876, drafted specifically to detail the permissible legislative enactment process and curtail legislative abuses including, primarily, "sneak" legislation. The vast majority of states across the country have copied Pennsylvania's 1876 constitutional revisions and interpreted them to prohibit the types of procedures at issue here. *See, e.g.*, *Opinion of the Justices No. 352*, 672 So.2d 1290, 1292-93 (Ala. 1996); *In re Roberts*, 5 Colo. 525 (1881), MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 771(2) (Nat'l Council of State Legislatures 2000).

Nevertheless, having been allowed to fester one place by the courts, the corruption of these principles is now spreading to other states. *See, e.g.*, "Judges trying to pull a fast one," *Sacramento Bee* (Jan. 30, 2009) ("[S]neaker bills do not go through the normal hearing process. They have not been analyzed for their potential impacts on the state budget or policy. They are being sneaked through because a full public airing would likely result in their demise or result in bad publicity for their authors. ... The proposed bill in question would benefit the state's judges – including many of the 1,600 who serve on superior courts, the appellate courts and the state Supreme Court."); M. Lifsher, "Cable companies seeking a new tax on satellite TV," *Los Angeles Times*, Sept 3, 2009 ("Discussion of the proposed satellite TV tax has been mostly hush-hush in Sacramento, with no bill actually being written and no committee hearings held...[and] with the idea of adding it to a noncontroversial bill on Indian gambling, that is close to winning final passage and being sent to the governor...so that a bill can be approved with minimal review by lawmakers, interested parties or the public.")

Throughout this litigation, the Respondents have advanced – and the district court largely accepted – sweeping assertions blending Article III justiciability with Tenth and Eleventh Amendment federalism concerns, to argue that such major and shocking problems as institutionalized case-fixing in return for public exclusion from and the selective de-democratization of the legislative process are simply matters of internal state decisions as to how to allocate powers between its branches of government, which the federal courts and the United States Constitution are powerless to address. This view of the case – whose

linchpin has been the unreviewability of these outrages under the "generalized grievance" doctrine specifically *because* they violated the constitutional rights of millions of people – has tremendous and deleterious implications for our federal system as a whole, for the supremacy of the United States Constitution, and for our nation. Holding that widespread violations by state actors of individual constitutional rights are beyond the reach of federal courts threatens the settled understanding of the role of federal courts and the federal Constitution in our federal system. The decisions below merit and require the review of the United State Supreme Court.

CONCLUSION

For the foregoing reasons, the requested Writ ought properly to issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

No. 06-3391

[Filed February 26, 2009]

COMMON CAUSE OF PENNSYLVANIA; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; REPRESENTATIVE GREGORY VITALI; TIM POTTS; CARL H. SILVERMAN; WILLIAM R. KOCH; H. WILLIAM McINTYRE,	)
Appellants	)
v.	)
COMMONWEALTH OF PENNSYLVANIA; EDWARD G. RENDELL, Governor; ROBERT P. CASEY III; DAVID G. ARGALL; DAVID J. BRIGHTBILL; H. WILLIAM DeWEESE; ROBERT C. JUBELIRER; ROBERT J. MELLOW; JOHN M. PERZEL; SAMUEL H. SMITH; MICHAEL VEON; RALPH J. CAPPY	)

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. No. 1:05-cv-02036)
District Judge: Honorable Yvette Kane

Before: FLAUM, EBEL and LEVAL, *Circuit Judges.*[*]

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[*] Honorable Joel M. Flaum, United States Circuit Judge for the Seventh Circuit Court of Appeals, Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit Court of Appeals, and Honorable Pierre N. Leval, United States Circuit Judge for the Second Circuit Court of Appeals, sitting by designation.

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OPINION OF THE COURT

EBEL, *Circuit Judge*.

This appeal stems from litigation challenging a short-lived Pennsylvania statute ("Act 44") that increased salaries for state legislators, executive officials and state judges. Plaintiffs are Pennsylvania citizens, a state representative and two organizations—Common Cause and the League of Women Voters. They sued the Commonwealth of Pennsylvania, its governor and treasurer, the General Assembly's leadership, and the Chief Justice of the Pennsylvania Supreme Court, in their individual and official capacities. Plaintiffs allege that, for the past ten years, members of the Pennsylvania Supreme Court have traded judicial decisions favorable to the Pennsylvania General Assembly in return for the legislature's funding the state judiciary. According to Plaintiffs, this arrangement culminated in the General Assembly's enactment of Act 44 in a sleight-of-hand manner during the dead of night. In this litigation, Plaintiffs primarily challenge the manner in which Act 44 was enacted, seeking both declaratory and injunctive relief. Because Plaintiffs allege only general grievances shared by all citizens of Pennsylvania, however, we conclude that they lack standing to pursue the claims they assert. Therefore, having jurisdiction to consider this appeal under 28 U.S.C. § 1291, we AFFIRM the decision of the district court to dismiss Plaintiffs' action in its entirety.

I. BACKGROUND

Because the district court dismissed Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1) and (6), see

Common Cause of Pa. v. Pennsylvania, 447 F. Supp. 2d 415, 419 n.1, 422 (M.D. Pa. 2006), we must accept as true all well-pled allegations and construe the complaint in the light most favorable to the plaintiffs, see Lewis v. Atlas Van Lines, Inc., 542 F.3d 403, 405 (3d Cir. 2008) (Rule 12(b)(6)); Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006) (Rule 12(b)(1) and (6)).

A. Factual allegations

In their second amended complaint, Plaintiffs alleged the following:

1. Events leading up to the General Assembly's enactment of Act 44

The Pennsylvania Constitution provides that

> [t]he judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa. Const., art. V, § 1. Based upon this constitutional provision, Allegheny County, in 1985, sued the Commonwealth, arguing that, contrary to the relevant Pennsylvania statutes enacted by the General Assembly, the Pennsylvania Constitution required the Commonwealth, rather than the County, to fund the

County's Court of Common Pleas. See County of Allegheny v. Commonwealth, 534 A.2d 760, 761, 763 (Pa. 1987). The Pennsylvania Supreme Court agreed, holding "that the statutory scheme for county funding of the judicial system is in conflict with the intent clearly expressed in the constitution that the judicial system be unified." Id. at 765. Nevertheless, the Pennsylvania Supreme Court provided that,

> because this order entails that present statutory funding for the judicial system is now void as offending the constitutional mandate for a unified system, we stay our judgment to afford the General Assembly an opportunity to enact appropriate funding legislation consistent with this holding. Until this is done, the prior system of county funding shall remain in place.

Id. (footnotes omitted).

Notwithstanding this mandate from the Pennsylvania Supreme Court, however, the General Assembly declined to act to fund the courts. See Pa. State Ass'n of County Comm'rs v. Commonwealth, 681 A.2d 699, 700-01 (Pa. 1996). After nine years of inaction, the Pennsylvania Association of County Commissioners sought mandamus relief from the Pennsylvania Supreme Court, asking the Court to direct the General Assembly to fund the state's unified court system. See id. The Pennsylvania Supreme Court granted a writ of mandamus: "Pursuant to this writ, jurisdiction is retained and by further order a master will be appointed to recommend to this court a schema which will form the basis for the specific implementation to be ordered." Id. at 703.

At about this same time, the General Assembly, contrary to the Pennsylvania Constitution, was generally enacting legislation "in ways that precluded involvement in the legislative process by both the public and the vast majority of legislators." App. at 43. Common Cause, as well as other parties, sued Pennsylvania in state court, challenging the validity of these various legislative enactments.

In 1998 and 1999, the General Assembly negotiated with the Pennsylvania courts over the Commonwealth's funding the court system. Those negotiations resulted in the General Assembly enacting legislation to fund the Commonwealth's unified judicial system in return for the Pennsylvania Supreme Court's judicial decisions upholding the legislation being challenged in state court.

2. Enactment of Act 44

In 2005, the Chief Justice of the Pennsylvania Supreme Court, "in secret," negotiated with state legislators for the enactment of a bill increasing the salaries of the Commonwealth's judges and justices. Eventually, this pay hike was included in legislation that also increased the salaries for legislators and high-level executive branch employees.

House Bill 1521, the bill that would become Act 44, was initially "a 24-line bill" entitled "Relating to Compensation for Executive Branch Officials," which prohibited "any member of the executive branch or any board from receiving compensation greater than that paid to the Governor." App. at 49. The House passed House Bill 1521. The Senate then amended House Bill 1521, changing it "into a 27-line bill restricting its

application to officials elected or appointed to an executive branch position after November 1, 2006." Id. at 50. The Senate passed the bill as amended. The House, however, rejected the revised bill and so House Bill 1521 was referred to a conference committee consisting of three House and three Senate members. The members of this conference committee, named as defendants in this litigation, included most of the General Assembly's leadership.

"At approximately 2:00 a.m. on July 7, 2005," the conference committee amended House Bill 1521, changing it from a twenty-seven-line bill about compensation for executive officials into "a 22 page bill, providing for massive increases of up to 54% in the salary of every justice and judge of the Pennsylvania Unified Judicial System, every member of the General Assembly, and senior members of the executive branch including the Governor and members of his Cabinet." Id. at 51. The revised bill also mandated "that provisions of the Act are nonseverable and if any provision of the Act or its application to any person or circumstance is held invalid, the remaining provisions or applications of the Act are void." Id. at 65. According to Plaintiffs, by including this non-severability provision, "the Commonwealth government intentionally created a financial conflict for state court judges to ensure they would not deviate from the negotiated goal of upholding salary increases for all three branches of state government." Id. at 66.

This revised bill was presented to the Senate and House within "minutes" after being reported out of the conference committee "under a rule prohibiting any amendment." Id. at 52. Both chambers passed the bill.

"A few hours later, the Governor signed" the bill "into law," and it immediately took effect.[1] Id. at 53, 66, 317.

3. Reaction to Act 44

"There was a negative public response to [Act 44], focusing particularly upon its timing and method of passage . . . ." Stilp, 905 A.2d at 925. Several state-court actions challenged Act 44's validity. See id. at 926-28. Four months after its enactment, the General Assembly, on November 16, 2005, repealed Act 44 "in its entirety" and reinstated the previous pay scheme ("Act 72").[2] App. at 53;

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[1] The Pennsylvania Supreme Court later held this legislative process did not violate the Pennsylvania Constitution. See Stilp v. Commonwealth, 905 A.2d 918, 951-59 (Pa. 2006).

[2] Act 72 was intended to decrease all state officials' salaries to pre-Act 44 levels. Because Act 72 repealed Act 44, the district court in this litigation held that Plaintiffs' claims seeking a declaration that Act 44 was unconstitutional were now moot. See Common Cause, 447 F. Supp. 2d at 424.

After the district court dismissed Plaintiffs' case in its entirety, however, the Pennsylvania Supreme Court held that Act 72 was itself unconstitutional insofar as it decreased judges' salaries. See Stilp, 905 A.2d at 939, 949. Specifically, the court held that Act 72 violated the Pennsylvania Constitution's provision stating that "Justices, judges and justices of the peace . . . shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth." Id. at 929-30 (citing Pa. Const. art. V, § 16(a)). The Pennsylvania Supreme Court went on to conclude, however, "our finding of this unconstitutional effect does not taint the remainder of Act 72. Thus, we find that the remainder of Act 72's repeal of Act 44 is valid." Id. at 949.

Because part of Act 44, the portion increasing judges' salaries, thus remained in effect, the Pennsylvania Supreme Court went ahead and addressed the validity of that statute. The court held that the manner in which the General Assembly enacted Act 44 did not violate Pennsylvania's constitution. See id. at 949-59. But Act 44's provision of unvouchered expenses to state legislators—a thinly veiled attempt to permit current legislators to enjoy the Act's pay increase, contrary to state law—was invalid. See id. at 960-70.

The state supreme court then held that, notwithstanding Act 44's express non-severability clause, the Act actually left it to "the Judiciary to make the ultimate determination of severability." Id. at 973. The court then severed the invalid provision of Act 44—the provision of "unvouchered expense[s]" for legislators—from the "otherwise-constitutionally valid remainder of Act 44." Id. at 980-81.

The ultimate result of the Pennsylvania Supreme Court's analysis was "that Act 44's provisions . . . which relate solely to the formula to determine compensation paid to the Judiciary, remain[ed] in force." Id. at 981. The court further noted,

> this Court did not draft or play any role in the enactment of the legislation that became Act That legislation, passed by the General Assembly and duly signed by the Governor, set the compensation judges were to receive, and in July of 2005 the Judiciary began receiving that compensation, only to have the compensation unconstitutionally reduced by Act 72.
>
> The Constitution of Pennsylvania mandates that the Judiciary shall be compensated as provided by law. To effectuate that constitutional command, we order that the Treasurer of the Commonwealth: (1) shall forthwith calculate judicial compensation in accordance with Act 44, as explained in this Opinion; and (2) shall, upon receipt of vouchers prepared by the Administrative Office of Pennsylvania Courts, reimburse members of the Judiciary

see Stilp, 905 A.2d at 924-25 & 924 n. 3.

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for the unconstitutional diminution in compensation effected by Act 72.

Id.

The Pennsylvania Supreme Court's decision in Stilp was entered September 14, 2006. See id. at 918. Ten months later, on July 13, 2007, the Pennsylvania legislature enacted a third statute, Act 30, which replaced the reinstated portions of Act 44 regarding judges' salaries. Apparently in order to avoid the Pennsylvania constitution's prohibition against the legislature reducing the salaries of sitting judges, Act 30 gave the judges a one dollar raise from their salaries as they existed on that date, July 14, 2007, and enacted a new formula for calculating future cost-of-living raises for state court judges. The parties appear to agree that Act 30 repealed the remaining portion of Act 44 reinstated by the Pennsylvania Supreme Court.

The net result appears to be that, despite the now complete repeal of Act 44, some Pennsylvania judges' salaries remain higher than they were prior to the General Assembly's enactment of Act 44. It is on this basis that Plaintiffs argue that, even though Act 44 has been repealed in its entirety, it made lasting effects on state judges' salaries such that Plaintiffs' claims are not moot. Because we decide this appeal on the basis of standing, we need not address whether Plaintiffs' claims are moot. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180, 189 (2000) (addressing standing before mootness); County of Riverside v. McLaughlin, 500 U.S. 44, 51-52 (1991) (same); United Artists Theatre Co. v. Walton, 315 F.3d 217, 225-26 (3d Cir. 2003) (same). See generally Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (noting that "[m]ootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)") (quotations omitted).

B. Procedural posture of this litigation

Plaintiffs initiated this federal litigation on October 6, 2005, a month before the Pennsylvania legislature repealed Act 44. Plaintiffs amended their complaint once before that repeal, and a second time after the General Assembly repealed Act 44. In their second amended complaint, Plaintiffs alleged five federal and eight state-law claims, and sought both injunctive and declaratory relief.

Defendants moved to dismiss all of Plaintiffs' claims, under Fed. R. Civ. P. 12(b)(1) and (6), for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.[3] In a very thorough decision, the district court granted Defendants' motions to dismiss Plaintiffs' federal claims. See Common Cause, 447 F. Supp. 2d at 419, 431 n.14. In light of that determination, the court held that it did not need to consider Plaintiffs' pendent state-law claims and, therefore, dismissed Plaintiffs' complaint "in its entirety." Id. at 431 n.14, 438. Plaintiffs appeal the district court's decision dismissing their federal claims.

II. STANDARD OF REVIEW

The district court held, among other things, that Plaintiffs lacked standing to assert the federal claims they are pursuing in this litigation. See id. at 424-30.

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[3] Before the district court, Plaintiffs conceded that the Commonwealth should be dismissed as a party. The district court also dismissed Defendant Treasurer Casey. Plaintiffs do not challenge either of these dismissals on appeal.

"Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." Taliaferro, 458 F.3d at 188. This court reviews "dismissals for lack of standing de novo." Graden v. Conexant Sys. Inc., 496 F.3d 291, 294 n.2 (3d Cir. 2007), cert. denied, 128 S. Ct. 1473 (2008); see also Goode v. City of Philadelphia, 539 F.3d 311, 316 (3d Cir. 2008).

> In an appeal from a grant of a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), we review only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court. Challenges to subject matter jurisdiction under Rule 12(b)(1) may be facial or factual. Facial attacks, like this one, contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true.

Taliaferro, 458 F.3d at 188 (citations, quotations omitted). Further, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant[s'] conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quotation, alterations omitted); see also Pa. Prison Soc'y v. Cortes, 508 F.3d 156, 161 (3d Cir. 2007).

Plaintiffs, as the parties invoking the federal courts' jurisdiction, bear the burden of establishing their standing. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006).

III. STANDING

A. General standing principles

Standing implicates both constitutional requirements and prudential concerns. See Kowalski v. Tesmer, 543 U.S. 125, 128 (2004).

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. The standing requirement is born partly of an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quotations, citations omitted). A federal court "[a]lways . . . must balance the heavy obligation to exercise jurisdiction against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary." Id. (quotations, citations omitted). Thus, Article III's standing requirement "is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc. 454 U.S. 464, 476 (1982). Invoking the power of the federal judiciary requires more than important issues and able litigants. See id. at 489-90.

1. Constitutional standing requirements

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.' That case-or controversy requirement is satisfied only where a plaintiff has standing." Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2535 (2008); see also Valley Forge Christian Coll., 454 U.S. at 471.

> [I]n order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (i.e., a "concrete and particularized" invasion of a "legally protected interest"); (2) causation (i.e., a "fairly traceable" connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is "likely" and not "merely speculative" that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Sprint Commc'ns Co., 128 S. Ct. at 2535 (quoting Lujan, 504 U.S. at 560-61) (further quotation, alterations omitted); see also Cortes, 508 F.3d at 161. "In this manner does Art. III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" Valley Forge Christian Coll., 454 U.S. at 472 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)). "Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects the proper—and properly

limited—role of the courts in a democratic society." DaimlerChrysler Corp., 547 U.S. at 341 (quotation omitted). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Id. (quotations omitted). "If a dispute is not a proper case or controversy, the courts have no business deciding it . . . ." Id.

Of particular relevance to this case, a plaintiff must allege an actual, concrete injury. See Sprint Commc'ns Co., 128 S. Ct. at 2535; Lujan, 504 U.S. at 560. It is not enough to assert a generalized, abstract grievance shared by a large number of similarly situated people. See Valley Forge Christian Coll., 454 U.S. at 482-83 (citing cases). We go on to discuss prudential standing.

2. Prudential standing requirements

In contrast to constitutional standing, prudential standing "embodies judicially self-imposed limits on the exercise of federal jurisdiction." Elk Grove Unified Sch. Dist., 542 U.S. at 11 (quotation omitted). Although the Supreme Court has

> not exhaustively defined the prudential dimensions of the standing doctrine, [the Court has] explained that prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. at 12 (quotation omitted); see also Valley Forge Christian Coll., 454 U.S. at 474-75; Twp. of Piscataway v. Duke Energy, 488 F.3d 203, 209 (3d Cir. 2007).

> Without such limitations–closely related to Art. III concerns but essentially matters of judicial self-governance–the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

Elk Grove Unified Sch. Dist., 542 U.S. at 12 (quotation omitted).

Of import in this case, then, "even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the [Supreme] Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian Coll., 454 U.S. at 474-75 (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)).

3. Generalized grievances

"Whether styled as a constitutional or prudential limit on standing, the [Supreme] Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998) (citing cases).

Based upon this reasoning, the Supreme "Court repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." Valley Forge Christian Coll., 454 U.S. at 482-83 (quotation, alteration omitted; citing cases); see also Massachusetts v. E.P.A., 549 U.S. 497, 516-17 (2007) ("We will not . . . entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."); Lance v. Coffman, 549 U.S. 437, 442 (2007) (per curiam) (noting that the "[t]he only injury plaintiffs allege is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); Lujan, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government–claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large–does not state an Article III case or controversy."); id. at 573-77 (citing cases); Goode, 539 F.3d at 322 (holding taxpayers lacked standing to assert claims based upon generalized injury that all persons in Philadelphia suffered); Cortes, 508 F.3d at 164 (holding voters and taxpayers lacked standing to assert a "generalized grievance[] of concerned citizens"); Taliaferro, 458 F.3d at 185, 190 (holding homeowners lacked standing to assert generalized challenge to local zoning ordinance); Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 120-21 (3d Cir. 1997) (holding plaintiffs lacked standing to assert generalized claim

that they were injured by knowing that creek was being polluted).

Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." Valley Forge Christian Coll., 454 U.S. at 479 (quotation, alteration omitted). Therefore, "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." Id. at 483.

This reasoning "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the common concern for obedience to law." Akins, 524 U.S. at 23 (quotation omitted). "The abstract nature of the harm—for example, injury to the interest in seeing that the law is obeyed–deprives the case of the concrete specificity . . . which . . . prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion." Id. at 24. "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the [Supreme] Court has found 'injury in fact.'" Id.; see also Massachusetts v. E.P.A., 549 U.S. at 517; Goode, 539 F.3d at 322 (noting in that case that "[a]ppellants lack standing, . . . not because the alleged injuries they suffer are widely felt, but because their injuries are no different in nature from the general interest in enforcing compliance with the law which the public shares").

In this appeal, Plaintiffs argue they are not asserting generalized grievances, but are instead alleging the deprivation of "personal rights" under the First, Fifth and Fourteenth Amendments. Even so, Plaintiffs must allege that they directly suffered an actual injury to those rights. See Valley Forge Christian Coll., 454 U.S. at 482-87; see also Goode, 539 F.3d at 315, 320-22 & 322 n.7 (applying same standing analysis to a citizen taxpayer's claims alleging the deprivation of rights under the First, Fifth and Fourteenth Amendments to access the courts and to petition the legislature, and thus requiring plaintiff to establish an actual and direct injury to her rights in order to have standing).

4. Plaintiffs' status

The named plaintiffs include four individuals—Tim Potts, Carl H. Silverman, William R. Koch and H. William McIntyre—who are Pennsylvania residents, citizens and taxpayers. Plaintiff Greg Vitali is a citizen and taxpayer in Pennsylvania. He is also a member of the Pennsylvania House of Representatives who voted against Act 44.[4]

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[4] In their second amended complaint, Plaintiffs alleged that each of the named plaintiffs, both individuals and associations alike, are taxpayers as well as citizens and residents of Pennsylvania. Nevertheless, Plaintiffs expressly do not rely on their status as taxpayers to establish their standing to assert the claims they pursue in this litigation. Accordingly, we do not reach the issue, although we note that under the present thinking of a majority of the Supreme Court, Plaintiffs would appear not to have standing as taxpayers under the circumstances alleged here. See Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007) (plurality); see also 13B Charles Alan Wright, Arthur R. Miller &

Two of the plaintiffs—Common Cause of Pennsylvania and the League of Women Voters—are associations. Common Cause "is a national non-partisan citizen advocacy organization concerned with advancing integrity in government. Common Cause's primary goal is governmental accountability and responsiveness, which it promotes through lobbying, oversight, education, outreach and litigation programs." App. at 33. "Common Cause of Pennsylvania has over 10,000 members in Pennsylvania." Id.

Plaintiff League of Women Voters of Pennsylvania "is a membership based, non-partisan, non-profit corporation organized under the laws of Pennsylvania. The League's purpose is to promote the informed and active participation of citizens in their government." Id. at 34. Its "membership consists of [Pennsylvania] citizens, taxpayers, and voters." Id.

An association's or organization's standing presents special considerations.

> [A]n organization or association may have standing to bring suit under two circumstances. First, an organization may be granted standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the organization or association itself may enjoy. Alternatively, an association may assert claims on behalf of its members, but only where the record shows that the

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Edward H. Cooper, Federal Practice & Procedure § 3531.10.1 (3d ed. 2008).

> organization's individual members themselves have standing to bring those claims.

Cortes, 508 F.3d at 162-63 (citations, alterations omitted); see also Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 283 (3d Cir. 2002). Thus, "an organization may sue to redress its members' injuries, even without a showing of injury to the association itself." United Food & Comm'l Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552 (1996).

"'[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" Id. at 553 (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)); see also Pa. Psychiatric Soc'y, 280 F.3d at 283. The first requirement, "that at least one of the organization's members would have standing to sue on his own, is grounded on Article III as an element of the constitutional requirement of a case or controversy." United Food & Comm'l Workers Union Local 751, 517 U.S. at 554-55 (quotation omitted). The second prong

> is, at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and

> thus be in a position to serve as the defendant's natural adversary.

Id. at 555-56. The third prong, on the other hand, is prudential in nature, rather than a constitutional requirement. See id. at 556-57.

In this case, the two Plaintiff associations base their standing solely on injuries suffered by their members. Therefore, because Plaintiffs Common Cause and the League of Women Voters have "alleged no injury to [themselves] as an organization, distinct from injury to [their] taxpayer members," their

> claim to standing can be no different from those of the members [they] seek[] to represent. The question [presented, then,] is whether [their] members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.

Valley Forge Christian Coll., 454 U.S. at 476 n.14 (quotation omitted). Because the standing of the two Plaintiff associations thus rests on the standing of their members, and because Plaintiffs allege that the associations' members suffered the same injury as the individual plaintiffs, save perhaps Representative Vitali, we will address the associations' standing together with that of the individual plaintiffs.

B. Plaintiffs' claims

The standing inquiry "often turns on the nature and source of the claim asserted." Raines v. Byrd, 521

U.S. 811, 818 (1997) (quotation omitted). Therefore, "[i]n determining whether appellants have standing, we must consider their specific allegations and the relief which they seek." Goode, 539 F.3d at 316 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983)). Although in their second amended complaint, Plaintiffs originally alleged five federal claims, on appeal they continue to pursue only three of those five claims.[5]

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[5] Plaintiffs' first federal claim, entitled "Conspiracy to Violate Civil Rights," alleged that Defendants John Perzel, the Pennsylvania house speaker, and Robert Jubelirer, the state senate president, conspired with "unknown members of the Pennsylvania Supreme Court to be later named as Defendants" to enact Act 44, in violation of the Pennsylvania Constitution, by exchanging "illegally negotiated legislative outcomes . . . for decisions by the Pennsylvania Supreme Court desired by legislative Defendants." App. at 67. The second amended complaint further alleged generally that these Defendants also conspired to authorize legislation enacted in violation of the Pennsylvania Constitution. Plaintiffs asserted this claim under 42 U.S.C. §§ 1983, 1985. In their appellate briefs, however, Plaintiffs do not ever mention this conspiracy claim. Therefore, we deem Plaintiffs to have abandoned it. See Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993).

Plaintiffs' second federal claim alleged that the fact that Defendants included a non-severability clause in Act 44 deprived Plaintiffs of due process because that clause denied Plaintiffs "a fair hearing before an impartial tribunal." App. at 68. Plaintiffs, however, do not reassert any challenge to the non-severability clause itself on appeal. Therefore, we also deem that specific claim abandoned. See Kost, 1 F.3d at 182.

1. The state judiciary's involvement in the legislative process deprived Plaintiffs of due process

In their second amended complaint, Plaintiffs alleged only that Defendants deprived Plaintiffs of due process when Defendants "engaged in private conversations on legislative matters with one or more justices of the Pennsylvania Supreme Court that might come before the court." App. at 69. The district court held that Plaintiffs lacked standing to assert this claim. See Common Cause, 447 F. Supp. 2d at 426-30. We agree. Clearly these allegations, which challenge the legislative process, are insufficient to allege more than a generalized, abstract grievance, shared by all Pennsylvania citizens. The complaint does not attempt to identify an actual, concrete injury that this conduct caused any of the named Plaintiffs. Cf. Goode, 539 F.3d at 315, 320-22 (dismissing taxpayers' access-to-court claim because their alleged "injuries are no different in nature from the general interest in enforcing compliance with the law which the public shares").

For the first time on appeal, Plaintiffs attempt to focus on the potential state judicial process, arguing that Defendants' actions deprived Plaintiffs of due process, and specifically an impartial decisionmaker, because (1) Act 44 gave the judiciary a pecuniary interest in any litigation challenging that Act; (2) the judiciary participated in creating the challenged legislation; and (3) the Pennsylvania Chief

Justice[6] negotiated with the legislature for the predetermined result of any later court challenges to Act 44 brought before the Pennsylvania Supreme Court. A litigant generally cannot create standing through new allegations asserted for the first time on appeal. See Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 297 (3d Cir. 2003); see also In re Mystic Tank Lines Corp., 544 F.3d 524, 528 (3d Cir. 2008) (noting "[t]his court has consistently held that it will not consider issues that are raised for the first time on appeal," absent "exceptional circumstances"). Even considering these new allegations, however, Plaintiffs have still failed to establish that they suffered an actual injury from this challenged conduct sufficient to give them standing.

For example, Plaintiffs do not allege that they ever challenged Act 44 in state court and that, in doing so, they were deprived of an impartial decisionmaker. Instead, they allege, in the abstract, that if Plaintiffs had brought suit in Pennsylvania courts challenging Act 44, they would not have had an impartial decisionmaker: "The Appellants here, who have challenged such enactments before and could be expected to do so again, were thereby denied any chance of the constitutionally required access to an impartial tribunal, and thus due process of law, in state court." Aplt. Br. at 16. That is not sufficient to state the actual or imminent injury necessary for

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[6] Plaintiffs, on appeal, make this allegation against a named defendant, Chief Justice Cappy, as well as against unnamed "other Justices" of the Pennsylvania Supreme Court. See Aplt. Br. at 35 n.7, 36-37.

constitutional standing. See Massachusetts v. E.P.A., 549 U.S. at 517; Lujan, 504 U.S. at 560-61.

Further, Plaintiffs go on to articulate this claim as follows:

> The Appellants—in fact, all Pennsylvanians—started with state constitutional rights to an open and deliberative legislative process guaranteed them by Article III of the state constitution; these rights . . . have consistently been found to be justiciable and defensible in the Pennsylvania courts, and thus the plaintiffs here also possessed a legal right to bring suit in state court to challenge the deprivation of their Article III rights by the passage of Act 44 and other legislation challenged in the past or potentially challengeable at the time of these events.

Aplt. Br. at 40 (emphasis added); see also id. at 24 (arguing Defendants, who are "leading figures of the Pennsylvania state government[,] attempted systematically to deny [a neutral and disinterested decision maker] to the people of their Commonwealth"); id. at 37-38 (asserting "the Chief Justice and potentially other Justices agreed before the pay-raise legislation was even enacted that the state courts would uphold it . . . against legal challenge by any citizens") (emphasis added). These arguments highlight the fact that Plaintiffs are asserting only a generalized, abstract grievance held by "all Pennsylvanians." Plaintiffs have, thus, failed to allege that they have directly suffered a personalized, actual or imminent injury, as Article III requires.

For all of these reasons, we conclude the district court did not err in dismissing Plaintiffs' due process claim because they lacked standing to assert it.

2. The truncated legislative process underlying the General Assembly's enactment of Act 44 deprived Plaintiffs of equal protection and due process

Plaintiffs, in their second amended complaint, next challenged the manner in which the General Assembly enacted Act 44, alleging that Defendants, by "implement[ing] a truncated legislative process, as part of a continuing pattern of illegal statutory enactment," deprived Plaintiffs of both due process and equal protection. App. at 69-70. The district court held that Plaintiffs lacked standing to assert this claim, as well. See Common Cause, 447 F. Supp. 2d at 426-30. Again, we agree. Plaintiffs failed to allege how this legislative process actually injured them directly. Instead, they alleged a generalized, abstract grievance shared by all Pennsylvanians.

On appeal, Plaintiffs assert only an equal protection claim. Thus, we deem them to have abandoned any due process challenge to the manner in which the General Assembly enacted Act 44, although our conclusion that Plaintiffs lack standing would equally bar Plaintiffs' due process claim had it been preserved. See Kost, 1 F.3d at 182.

For the first time on appeal, Plaintiffs make additional allegations to support their standing to challenge the way Act 44 was enacted. They also differentiate the grounds on which the citizen

plaintiffs have standing from the basis for Representative Vitali's standing.

Again, Plaintiffs generally cannot create standing through new allegations asserted for the first time on appeal. See Storino, 322 F.3d at 297; see also In re Mystic Tank Lines Corp., 544 F.3d at 528. Nonetheless, even considering these additional allegations, Plaintiffs have failed to establish that they have constitutional standing to pursue this equal-protection challenge to the procedures by which the General Assembly enacted Act 44.

On appeal, Plaintiffs contend that

> the extra-legal process designed by [Defendants] to enact Act 44, in which a select few legislators were the only ones allowed–secretly–to draft, propose or alter even a single word of the legislation, deprived the vast majority of legislators, including Appellants['] Representative [Plaintiff] Greg Vitali, and their constituents such as Appellants of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Aplt. Br. at 43. More specifically, Plaintiffs argue on appeal that Defendants deprived them of equal protection by assigning the original house bill to a conference committee, composed of only named Defendants, which completely redrafted the original house bill in secret, and then submitted it to the General Assembly under a rule prohibiting any of the other legislators from amending the submitted bill.

> As a result [Defendants] ensured that they and only they were able to exercise the full panoply of legislative functions in drafting, debating and amending the text of the Act, while consigning [Plaintiff] Representative Greg Vitali and the elected representatives of the remaining Appellants to a mere up-or-down vote on final passage. A small class of legislators thus was given the abilities constitutionally appertaining to membership in the General Assembly to draft, discuss, debate, and amend the legislation at issue—all others were completely and expressly denied such ability.

Id. at 44.

Because Plaintiffs differentiate between Representative Vitali's standing and that of the other citizen Plaintiffs, we will address Vitali's standing separately.[7]

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[7] In their complaint, Plaintiffs never suggested that Vitali suffered any injury, as a state legislator, that was different from any injury suffered by the citizen plaintiffs. But in their brief to the district court opposing Defendants' motions to dismiss, Plaintiffs did suggest that Vitali had standing based upon his being a legislator:

> Plaintiff Greg Vitali is a member of the General Assembly and was personally excluded from his right to participate, as an elected representative of the 166th state legislative district, in the legislative process required by the state constitution. A process bypassed by individual defendants to this action resulting in the violation of Plaintiff Vitali's right to free speech, due process and equal protection of the laws guaranteed by the federal constitution.

App. at 191-92. However, in that brief, when Plaintiffs addressed

a. Plaintiff Vitali's standing

"'[L]egislators, like other litigants in federal court, must satisfy the jurisdictional prerequisites of Article III standing.'" Goode, 539 F.3d at 317 (quoting Russell v. DeJongh, 491 F.3d 130, 133 (3d Cir. 2007) (alteration omitted)).

> Concerns for separation of powers and the limited role of the judiciary are at the core of Article III standing doctrine and the requirement that a plaintiff allege an injury in fact. Those concerns are particularly acute in legislator standing cases, and they inform the analysis of whether a legislator plaintiff has asserted an injury in fact sufficient to confer standing to sue.

Russell, 491 F.3d at 133.

On appeal, Plaintiffs suggest that Defendants deprived Vitali of equal protection of the law by denying him, and other legislators, the ability to discuss, debate and perhaps amend Act 44 before having to vote on that legislation. As Plaintiffs point out in their brief, state legislators have, under different circumstances, sued based upon a direct injury suffered by that particular legislator. For instance, in Bond v. Floyd, state representative Julian

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the specifics of their equal protection claim, Plaintiffs never alleged that the manner in which Act 44 was enacted specifically deprived Vitali of equal protection of the law on any basis different from that alleged to have involved the other citizen plaintiffs. Id. at 216-22. Thus, this claim suffers the additional fatal defect that it was not adequately raised below.

Bond sued the Georgia legislature, seeking declaratory and injunctive relief that would permit him to take his seat in the Georgia legislature, after that body excluded him for comments Bond made against the Vietnam War, among other things. See 385 U.S. 116, 118, 125-26 (1966). Similarly, in Ammond v. McGahn, a New Jersey state senator, Alene Ammond, a Democrat, sued the Democratic senate caucus after the caucus excluded her for making negative remarks about the caucus. See 390 F. Supp. 655, 657 (D. N.J. 1975), rev'd on other grounds, 532 F.2d 325, 329 (3d. Cir. 1976); see also Parker v. Merlino, 646 F.2d 848, 849, 851-52 (3d Cir. 1981) (concluding, without addressing standing, that there was no merit to the claim asserted by several state legislators that other legislators violated their First and Fourteenth Amendment rights by terminating the opportunity for further debate before the legislature voted on two pending bills); Gewertz v. Jackman, 467 F. Supp. 1047, 1050, 1055-56 (D. N.J. 1979) (holding federal court had authority to consider state legislator's claim challenging the Democratic caucus's decision to remove him from the Appropriations Committee; noting that, although the legislator's claim implicated operations of the state's legislative body, the federal court was "require[d]" to consider this individual legislator's claim "that his constitutional rights have been violated by the legislature or its leaders"); see Davids v. Akers, 549 F.2d 120, 122-23 (9th Cir. 1977) (considering merits of claims brought by state legislators challenging the committee appointments made by the state house speaker).

In each of these cases, the courts addressed the merits of these claims brought by individual state legislators without specifically discussing whether

those legislators had standing to assert those claims. However, the Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996); see also Fed. Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 97 (1994); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37-38 (1952). See generally Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (noting that Supreme Court has "often said that drive-by jurisdictional rulings . . . have no precedential effect").

In this case, in any event, Vitali does not allege that he has suffered a direct and concrete injury specific to him, as a result of Defendants' challenged conduct. Rather, he challenges a procedure that excluded most of the Pennsylvania legislators.

Other cases, also relied upon by Plaintiffs, have concluded that a legislator has standing to challenge the nullification of his particular vote.

> [L]egislators have a legally protected interest in their right to vote on legislation and other matters committed to the legislature, which is sometimes phrased as an interest in "maintaining the effectiveness of their votes." Not every affront to a legislator's interest in the effectiveness of his vote, however, is an injury in fact sufficient to confer standing to sue.

Russell, 491 F.3d at 134 (citing cases). For example,

> courts have drawn a distinction . . . between a public official's mere disobedience of a law for which a legislator voted which is not an injury

> in fact–and an official's "distortion of the process by which a bill becomes law" by nullifying a legislator's vote or depriving a legislator of an opportunity to vote–which is an injury in fact.

Id. at 135.

Cases where a public official has directly injured a particular legislator by nullifying his vote, however, involve circumstances much different than those alleged here. See id. at 135-36 & 135 n.4 (citing cases); cf. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 & n.7 (1986) (noting, in dicta, that a lone dissenting school board member might have standing to assert a claim seeking to maintain the effectiveness of his vote, if state law required a unanimous board vote and the rest of the board, nevertheless, acted without the dissenting member's consent).

The Third Circuit addressed several such cases in Russell, 491 F.3d at 135-36. There, this court noted, for example, that Coleman v. Miller, 307 U.S. 433 (1939), "'stands, at most, for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified.'" Russell, 491 F.3d at 135 n.4 (quoting Raines, 521 U.S. at 823) (emphasis added); see also Baird v. Norton, 266 F.3d 408, 411-13 (6th Cir. 2001).

And in Dennis v. Luis, 741 F.2d 628 (3d Cir. 1984), the Third Circuit

> held that a group of legislators had standing to challenge the appointment by the Governor of the Virgin Islands of an "acting" Commissioner of Commerce without consulting them, where § 16(c) of the Organic Act, 48 U.S.C. § 1597(c), provided that the appointment of a Commissioner of Commerce was subject to the advice and consent of the Legislature. The plaintiffs in Dennis thus alleged that they possessed a specific right under § 16(c) of the Organic Act that the Governor had violated, and they had no clear recourse through the political process.

Russell, 491 F.3d at 135 n.4.

Further, in Silver v. Pataki, 755 N.E.2d 842 (N.Y. App. 2001),

> the New York Court of Appeals recognized an injury in fact when a state assembly member alleged that the governor made illegal use of his line item veto power by using it on bills that were not lawfully subject to the line item veto. The state assembly member had voted in favor of the bills in question, and the New York Court of Appeals held that the plaintiff had standing. . . . In Silver, the Governor's veto nullified the pending bills and forced the assembly member to try [to] persuade a supermajority of his colleagues to override the governor's veto if he wished to restore the status of the bills as law.

Russell, 491 F.3d at 135 n.4.

The circumstances alleged in this case are much different. Here, Representative Vitali was not precluded from voting on Act 44. Cf. id. at 135-36 (concluding legislator, asserting claim that Governor violated applicable deadlines in nominating justices of the Virgin Islands Supreme Court, did not allege that his ability to vote had been nullified where the legislator was still able to "confirm, reject, or defer voting on the Governor's nominees"). Nor has Vitali alleged that his vote was in any other way nullified. At most, Vitali merely alleges he was denied full input on the drafting and consideration of Act 44. But the denial was not specific to him; rather, its impact was felt by all legislators other than the select leadership. However, the legislative process inevitably involves a division of responsibilities, and leadership necessarily will have greater input in legislation being considered.

For these reasons, we conclude that Vitali has failed to allege that the manner in which the General Assembly enacted Act 44 actually and concretely injured him in particular. Even if Vitali had alleged such an injury (which we conclude he has not), Vitali has also failed to satisfy prudential standing concerns. Vitali's challenge to the manner in which the General Assembly enacted Act 44 is a clear example of one of those "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches" which the Supreme Court counsels federal courts to avoid adjudicating. Valley Forge Christian Coll., 454 U.S. at 474-75 (quoting Warth, 422 U.S. at 499-500); see also 13B Charles Alan Wright, Arthur Miller & Edward H. Cooper, Federal Practice & Procedure § 3531.11.3 (3d ed. 2008) (noting that "most disagreements among state

legislators will involve matters of state law, or issues of federal law that cannot be disentangled from the political functions of the legislature. Standing should be denied as to the federal questions, for reasons of federalistic deference to state legislatures that mirror the separation-of-powers deference to Congress").

For these reasons, the district court did not err in concluding Plaintiff Vitali lacked standing to challenge the manner in which the General Assembly enacted Act 44.

b. Citizens Plaintiffs' standing

On appeal, the citizen Plaintiffs (and the associations whose members are Pennsylvania citizens) allege that their elected state representatives were, like Representative Vitali, precluded from drafting, debating and amending Act 44. The New Jersey district court has suggested that a state legislator's constituents might be able to assert such a claim:

> The action by the Caucus in denying Senator Ammond the opportunity to attend its deliberations deprived her constituents of the Equal Protection of the law. In effect, the action by the Caucus created two classes of voters. One class consists of those citizens whose Senators could effectively participate fully in the legislative process and another class whose Senator could participate only to a limited degree.

Ammond, 390 F. Supp. at 660.

Even if we were to adopt the District of New Jersey's reasoning, however, the citizen Plaintiffs in this case are able to assert only a generalized, abstract grievance shared by most Pennsylvanians—that Defendant legislators denied Plaintiffs' representatives the equal opportunity to draft, debate and amend Act 44 before voting on that bill. See App. at 277 (Plaintiffs arguing to the district court that Defendants, through "their mechanism by avoiding the legislative process mandated by the Pennsylvania Constitution, . . . cut out the vast majority of the representatives and the people of Pennsylvania from the deliberative processes of the General Assembly. These are representational rights that are personal to every citizen in this state.") Such injury is insufficient to confer constitutional standing.

And even if they had established constitutional standing (which we conclude they did not), the citizen Plaintiffs cannot satisfy prudential standing concerns. See Valley Forge Christian Coll., 454 U.S. at 474-75.

c. Conclusion

It is clear that, before the district court, all of the Plaintiffs failed to establish their standing under Article III to pursue their due process/equal protection claim challenging the manner in which the General Assembly enacted Act 44. For the first time on appeal, Plaintiffs make additional standing arguments. Nevertheless, even if we were to consider those newly raised arguments, Plaintiffs have ultimately still failed to meet their burden of alleging that they suffered an actual and concrete injury sufficient to support constitutional standing. Nor can Plaintiffs satisfy prudential standing concerns. For all of these reasons,

this court affirms the district court's decision to dismiss Plaintiffs' due process/equal protection challenge to the process by which Act 44 was enacted.

3. First Amendment right to petition government

As their final federal claim, Plaintiffs alleged in their second amended complaint that Defendants, in enacting Act 44 in the manner they did, deprived Plaintiffs of their First and Fourteenth Amendment "freedom of speech to lobby their elected state representatives concerning passage of House Bill 1521 before it was enacted into law as Act 44." App. at 70. Specifically Plaintiffs alleged that

> Defendants, acting at all times under color of state law, implemented the legislative process used to enact Act 44, as part of a continuing pattern of illegal statutory enactment, thereby depriving Plaintiffs [of] their right to freedom of speech to lobby their elected state representatives concerning passage of House Bill 1521 before it was enacted into law as Act 44, as guaranteed by the First and Fourteenth Amendments to the United States Constitution, as more fully described in the preceding paragraphs, all in violation of 42 U.S.C. § 1983, for which the individual Defendants are individually liable.

Id. In the "preceding paragraphs" of the complaint, Plaintiffs further asserted that

> [t]he truncated legislative process used by the Leaders [of the General Assembly] to enact Act

> 44, and the early morning hour at which it was triggered, intentionally inhibited Plaintiffs[']ability to receive timely information regarding proposed government actions necessary to exercise their First Amendment right of free speech to support or oppose the Senate-House conference committee's new version of House Bill 1521 before it was enacted by the General Assembly into law.

Id. at 56.[8] The district court held that Plaintiffs lacked standing to assert this claim because they alleged only a generalized, abstract grievance shared by all Pennsylvanians. See Common Cause, 447 F. Supp. 2d at 426-30. Plaintiffs reiterate these same arguments on appeal.[9]

On appeal, Plaintiffs expand their First Amendment claim to encompass the alleged secret discussion of Act 44 that occurred between officials of the three branches of Pennsylvania's government, prior to the enactment of that legislation. Again,

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[8] On appeal, Plaintiffs make clear that they are not challenging the late hour at which the General Assembly considered Act 44: "Appellants do not allege that the Petition Clause prevents a state legislature from round the clock legislative sessions or constrains a legislature from enacting laws to times convenient to a citizen's right to petition government." Aplt. Br. at 61.

[9] Defendant Chief Justice Cappy complains that Plaintiffs, before the district court, alleged only a violation of their First Amendment freedom of speech and to lobby. According to Cappy, it is only in their appellate briefs that Plaintiffs expressly assert the deprivation of their freedom to petition the Government. It appears, however, that the gist of Plaintiffs' claim before the district court remains the same now on appeal.

Plaintiffs generally cannot create standing through new allegations asserted for the first time on appeal.[10] See Storino, 322 F.3d at 297; see also In re Mystic Tank Lines Corp., 544 F.3d at 528.

Even considering all of these allegations, however, Plaintiffs have failed to allege that they in particular were actually and concretely injured by Defendants' challenged conduct. Instead, Plaintiffs continue to allege only a general, abstract grievance shared by all Pennsylvanians. To illustrate this point, Plaintiffs specifically alleged in their complaint that "[t]he Leaders [of the General Assembly] intentionally deprived Plaintiffs, and the entire Pennsylvania electorate, of any notice of the text of House Bill 1521 . . . before it was enacted into law by a legislative process lasting a few hours in the very early morning." App. at 56 (emphasis added). And on appeal, Plaintiffs argue that

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[10] For the first time in their appellate reply brief, Plaintiffs allege that, at approximately 10:00 p.m. on July 6, 2005, citizen Plaintiff Potts contacted the executive director of Plaintiff Common Cause to find out if the General Assembly was to consider "anything of note" that night. Aplt. Reply Br. at 32 n.18. If so, Potts intended to "exercise his right to petition." Id. The executive director of Common Cause "made inquiries within the General Assembly and he was assured nothing of import or surprising would occur that night." Id. The Common Cause executive director informed Potts, who then "left on vacation." Id. The General Assembly enacted Act 44 at 2:00 a.m. the following morning. Because Plaintiffs waited until their appellate reply brief to make these allegations, we do not consider them. See United States v. Pellulo, 399 F.3d 197, 222 (3d Cir. 2005) (holding appellant ordinarily may not raise issue for the first time in a reply brief, absent exceptional circumstances); see also Storino, 322 F.3d at 297.

> the Petition Clause . . . must forbid individual state actors from intentionally and affirmatively orchestrating sophisticated modes of total interference with Appellants' right to informally petition and communicate with their elected state representatives on any issue of concern, including the Act in this case. The Petition Clause must preserve some small quantum of effective communication between the electorate and the elected from intentional interference by other state actors. To hold otherwise is to condemn a First Amendment right to a mere privilege subject to the whims of political elites; elites who far too often are beyond the electoral reach of those whose rights they have intentionally invaded.

Aplt. Br. at 61-62.

Because these allegations and arguments are only generalized, abstract grievances held by all Pennsylvanians, the district court did not err in concluding Plaintiffs lacked standing to challenge their First Amendment claim. Cf. Goode, 539 F.3d at 315, 320-22 (dismissing taxpayers' right-to-petition claim because their alleged "injuries are no different in nature from the general interest in enforcing compliance with the law which the public shares").[11]

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[11] Appellants' Request, dated February 5, 2009, for Leave to File Post-Argument Letter Brief is denied.

IV. CONCLUSION

For the foregoing reasons, we conclude Plaintiffs lack standing to pursue the federal claims they assert in this action. Therefore, we AFFIRM the district court's decision dismissing those claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:05-CV-2036
(Judge Kane)

[Filed June 12, 2006]

COMMON CAUSE OF PENNSYLVANIA, et al.,	)
Plaintiffs	)
COMMONWEALTH OF PENNSYLVANIA, et al.,	)
Defendants	)

MEMORANDUM

I. Introduction

Plaintiffs Common Cause of Pennsylvania, the League of Women Voters of Pennsylvania, Representative Greg Vitali, and four individual citizens of the Commonwealth of Pennsylvania, seek to invoke the jurisdiction of the federal courts to address alleged legislative misconduct by state officials that they claim resulted in constitutional violations. The

Complaint, as amended on October 31, 2005, and again on February 8, 2006, alleges that the leadership of Pennsylvania's General Assembly, together with the Governor and the Chief Justice of the Pennsylvania Supreme Court, conspired to violate Plaintiffs' constitutional rights by adopting and approving – in a manner that foreclosed public comment, full participation of all elected representatives, and honest judicial review – legislation providing substantial pay increases for the members of the General Assembly, the judiciary, and senior members of the executive branch of state government.

Plaintiffs ask that this Court declare that the Act of July 7, 2005, P.L. 201, No. 44 ("Act 44"), which was repealed on November 16, 2005, is unconstitutional and unenforceable, and declare that the process by which the Act was passed violated the United States Constitution. Additionally, Plaintiffs seek extraordinary and unprecedented declaratory and injunctive relief in the form of orders enjoining the Pennsylvania General Assembly from enacting hypothetically unconstitutional future legislation and enjoining the Pennsylvania Supreme Court from citing or relying on certain legal precedents established by that Court since 1999.

Defendants have separately moved to dismiss this action in its entirety, arguing, inter alia, that the matter as framed is not properly before this Court, and, in essence, that the relief sought cannot be granted without running afoul of fundamental principles of our republican form of government and the most basic legal tenets regarding justiciability of claims. Plaintiffs submitted a timely brief in opposition to Defendants' motions, and the Court heard oral

argument from the parties on May 19, 2006. For the reasons explained fully below, Defendants' Motions to Dismiss must be granted.

II. Background

For purposes of adjudicating the pending motions to dismiss, the Court is legally bound to accept as true all well-pleaded factual allegations set forth in the Second Amended Complaint.[1] The Court notes that none of Plaintiffs' factual allegations have been tested in Court, and are accepted at this time only for purposes of evaluating the pending motions to dismiss. At this stage of the proceedings, the Court must determine whether, if the facts as alleged are proved, Plaintiffs are entitled to the relief sought. Nevertheless, because allegations that public officials abrogated their oaths of office and engaged in base self-dealing undermine public confidence in our system of laws and subject officials to serious repercussions, the Court underscores that Plaintiffs' allegations are

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[1] Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of claims that fail to assert a basis upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In the context of a motion to dismiss under Rule 12(b)(6), the court must accept as true all of the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000) (citing Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)). Although the court is generally limited in its review to the face of the complaint, it "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see also In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

simply that – allegations. Accordingly, the following factual background is as alleged by Plaintiffs.

As noted, Plaintiffs' initial complaint was in the nature of a challenge to the constitutionality of a state statute, a matter routinely entrusted to our federal courts. Within weeks of Plaintiffs' challenge, the offending statute was repealed as a result of political processes, inviting the obvious question of whether there is anything left for this Court to decide. Following repeal of Act 44, Plaintiffs sought and were granted leave of court to amend, without objection from Defendants. Plaintiffs did so, broadening their claims to encompass the events that immediately preceded the legislative enactment. Now the keystone of Plaintiffs' complaint is the representation that in passing the pay raise for its members and for executive and judicial officials, the leaders of the Pennsylvania General Assembly acted in a manner that was so "unsavory" as to rise to the level of a constitutional violation that cannot go unaddressed, irrespective of the ultimate fate of Act 44. (Second Am. Compl. at 2-4.) Plaintiffs claim violation of due process, free speech and equal protection.

The Complaint, as twice amended, is an aggressive indictment of state government in Pennsylvania, containing shocking accusations that the House and Senate leadership, the Governor,[2] and the Chief

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[2] Plaintiffs concede that allegations against the Governor are the weakest link in the Complaint, and that the only basis for naming him is the unfavorable inference they draw from the fact that Governor Rendell signed Act 44 within hours of its passage. See Tr. of Oral Argument, May 19, 2006, at 73:12-14 ("I would agree

Justice of the Supreme Court of Pennsylvania acted in concert to pass, sign, and validate, ill-conceived legislation, in a manner that foreclosed public debate and independent judicial review, all in violation of Plaintiffs' rights to free speech, due process, and equal protection. As factual support, Plaintiffs allege that unnamed justices[3] of the Supreme Court of Pennsylvania have in the past traded judicial votes for legislative votes, with members of Pennsylvania's high court agreeing to cast favorable votes on important cases pending before the court in exchange for the legislature agreeing to fund the Commonwealth's Unified Judicial System. Specifically, Plaintiffs allege that in or around 1999 an unnamed justice or justices of the Pennsylvania Supreme Court negotiated with unnamed members of Pennsylvania's General Assembly to secure "legislation desired by the Court in exchange for rulings favorable to the legislative leadership on cases then pending before the Court challenging the constitutionality of the process by which important legislation was consistently enacted in secret." (Second Am. Compl. at 5.) Plaintiffs further offer their belief that unnamed justices of the Pennsylvania Supreme Court "bartered their votes on cases important to the interpretation and jurisprudence of key state constitutional provisions . . . in exchange for state funding desired by the Justices"

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with regard to the Governor that our argument is at its weakest. I would have to concede that.").

[3] The Court notes that only one member of the Pennsylvania Supreme Court – Chief Justice Ralph C. Cappy – has been named as a defendant in this action, and Defendant Cappy is not mentioned specifically in any of these particular allegations of quid pro quo negotiations that allegedly took place in 1999.

– specifically, regarding the Pennsylvania Supreme Court's mandate that the General Assembly fund the Commonwealth's Unified Judicial System. (Id.) In sum, Plaintiffs represent that in Pennsylvania, the "fix is in."[4]

Plaintiffs allege that at some point in the middle of 2004, the Chief Justice of the Pennsylvania Supreme Court, Defendant Ralph C. Cappy, entered into secret negotiations with leaders of the Pennsylvania General Assembly and the executive branch to increase the salary of every justice and judge of the Pennsylvania Unified Judicial System. (Second Am. Compl. ¶ 45.) Plaintiffs further allege that Chief Justice Cappy advocated "pegging certain judicial, legislative and executive branch salaries to the salary, or some fraction thereof, of certain designated federal officials." (Id. ¶ 46.)

Contemporaneous with these secret negotiations, on May 3, 2005, House Representatives Raymond Bunt, Jr. and Michael R. Veon introduced House Bill 1521, Printer's Number ("¶") 1865, a 24-line bill entitled "Relating to Compensation for Executive Branch Officials." House Bill 1521 proposed to limit the compensation of any member of the Commonwealth's executive branch or board from receiving compensation greater than that paid to the Governor. (Second Am. Compl. ¶¶ 56, 57.)

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[4] See Tr. of Oral Argument, May 19, 2006, at 50:1-6.

House Bill 1521 was passed by the House,[5] and on July 6, 2005, House Bill 1521, ¶- 2561, was passed by the Senate with amendments. (Id. ¶ 63.) The House refused to concur in the Senate's amendments, and the Senate insisted upon its amendments to the bill. (Id.) After the House insisted upon its non-concurrence to the amendments, a conference committee was appointed consisting of three House and three Senate members. (Id. ¶ 63.) The appointed conference committee was comprised of Robert C. Jubilerer, President Pro Tempore of the Senate; David J. Brightbill, Senate Majority Leader; Robert J. Mellow, Senate Minority Leader; Samuel H. Smith, House Majority Leader; David G. Argall, House Majority Whip; and Michael R. Veon, House Minority Whip, all named Defendants in this action. (Id. ¶ 64.)

At approximately 2:00 a.m. on July 7, 2005, the six-member conference committee amended House Bill 1521, now ¶-2570. (Id. ¶ 65.) The amendment converted the bill from its original 24-line version into a 22-page bill, providing substantial increases in the salary of every justice and judge of the Pennsylvania Unified Judicial System, every member of the

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[5] House Bill 1521 was immediately assigned to the House State Government Committee. (Id. ¶ 58.) On June 8, 2005, House Bill 1521, ¶-1865, passed the House without amendment and on June 13, 2005, the bill was assigned to the Senate State Government Committee. (Id. ¶¶ 59, 60.) On June 30, 2005, House Bill 1521, ¶-1865, was passed by the Senate State Government Committee as reported. (Id. ¶ 61.) On July 6, 2005, House Bill 1521 was reported to the Senate Appropriations Committee and amended as House Bill 1521, PN2561, a 27-line bill restricting its application to officials elected or appointed to an executive branch position after November 1, 2006. (Id. ¶ 62.)

Pennsylvania General Assembly, and senior members of the executive branch, including the Governor and members of his Cabinet. (Id.) The amendments were so extensive that the original subject matter of House Bill 1521 was deleted entirely. (Id. ¶ 66.)

Minutes after being reported out of the conference committee, HB 1521, ¶-2570, was presented to the Senate and the House under a rule prohibiting any amendment to the bill. (Id. ¶ 69.) Presentation of the bill in this manner represented "the only public consideration of, and the only opportunity for 247 of the General Assembly's 253 Members to vote on any provision of in House Bill 1521 as enacted." (Id. ¶ 70.) As alleged in the Second Amended Complaint, the "vast majority" of the General Assembly was given little or no notice of the bill's new subject matter, nor did they have time to read the statutory language carefully before voting. (Id. ¶ 73.) The House passed HB 1521, ¶-2570, by a vote of 119-79. (Id. ¶ 73.) Thereafter, the bill was passed by the Senate by a vote of 27-23. (Id. ¶ 74.) Hours later, the Governor signed HB 1521, ¶-2570, into law as Act 44.

Although the Second Amended Complaint provides little mention of the public outcry that followed passage of Act 44, on November 16, 2005, following months of sustained critical news coverage and public pressure, the General Assembly passed the Act of Nov. 16, 2005, P.L. 385, No. 72 ("Act 72") which repealed Act 44 in its entirety. Plaintiffs do acknowledge that there was "mounting public opposition" to the pay raise legislation following its passage, and further assert that when lawmakers voted to repeal Act 44, they were motivated at least in part "to try to escape public ire[.]" (Second Am. Compl. at 3, 6.)

III. Procedural History

Plaintiffs commenced this action by complaint filed on October 6, 2005 naming as defendants the Commonwealth of Pennsylvania, Governor Edward G. Rendell, and Treasurer Robert P. Casey, Jr. (Doc. No. 1.) On October 31, 2005, Plaintiffs filed their first amended complaint, adding the following Defendants: Senate President Pro Tempore Robert Jubilerer; Representative John M. Perzel; Senate Minority Leader Robert J. Mellow; House Minority Leader, H. William DeWeese; Senate Majority Leader, David J. Brightbill; House Majority Leader, Samuel H. Smith; House Majority Whip, David G. Argall; and House Minority Whip, Michael R. Veon. (Doc. No. 8.) Approximately two weeks later, on November 16, 2005, Act 44 was repealed by the Pennsylvania General Assembly. Upon request of the Commonwealth of Pennsylvania, the Court convened a telephone status conference on December 6, 2005, to determine whether Plaintiffs' claims had been rendered moot by the repeal of Act 44. During this status conference, Plaintiffs requested and were granted leave to file a second amended complaint within 60 days. On February 6, 2006, Plaintiff filed the Second Amended Complaint, naming Chief Justice Cappy as an additional defendant, deleting certain portions of the original amended complaint, and adding additional allegations regarding the process by which Act 44 was enacted that allegedly violated Plaintiffs' rights under the United States and Pennsylvania Constitutions.

IV. Summary of the Claims Alleged in the Second Amended Complaint

Relying upon the factual allegations summarized above, the Second Amended Complaint advances 13 counts representing separate, but substantially related, legal claims, including the following: (1) a claim alleging conspiracy to violate Plaintiffs' First and Fourteenth Amendment Rights, premised on the allegation that members of the General Assembly passed legislation favored by certain judges who in exchange rendered judicial decisions favorable to the legislature; (2) a claim that the General Assembly violated Plaintiffs' due process rights to a "fair hearing before an impartial tribunal by including in Act 44 a non-severability clause;" (3) a claim that Plaintiffs' due process rights were violated by Defendants engaging in "private conversations on legislative matters with one or more justices of the Pennsylvania Supreme Court that might come before the court;" (4) a claim that the "truncated legislative process" that was allegedly employed in enacting Act 44 represented "a continuing pattern of illegal statutory enactment" that violated Plaintiffs' rights to due process and equal protection; (5) a claim that Plaintiffs' First Amendment right to free speech was violated because they were allegedly prevented from lobbying their elected state representatives prior to passage of Act 44; (6) and eight pendent claims brought under the Pennsylvania Constitution.

V. Motions to Dismiss

Each of the named Defendants have moved to dismiss the Second Amended Complaint in its

entirety.[6] Although the Defendants have offered varying legal arguments in favor of dismissal, Defendants argue primarily that this Court lacks jurisdiction to consider Plaintiffs' claims, and that Plaintiffs lack standing to prosecute this action. Additionally, Defendants contend that the General Assembly's repeal of Act 44 has effectively rendered Plaintiffs' claims moot. These arguments will be addressed in turn.

VI. Discussion

A. This Action Does Not Present a Justiciable "Case" or "Controversy" Under Article III of the United States Constitution.

1. Mootness

It is axiomatic that under Article III, Section 2 of the United States Constitution, federal courts have authority to adjudicate an action only if it constitutes a justiciable "case" or a "controversy" that has real consequences for the parties. U.S. Const. art. I, § 2; Raines v. Byrd, 521 U.S. 811, 818 (1997); Eagle Envtl., L.P. v. Beckman, 237 F.3d 186, 192-93 (3d Cir. 2001). It is a corollary to this rule that federal courts may not issue advisory opinions where no genuine case or controversy exists. Sutton v. Rasheed, 323 F.3d 236, 248 (3d Cir. 2003) (citations omitted). Accordingly, the

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[6] Following a hearing held on the motions on May 19, 2006, the Court summarily dismissed the Commonwealth of Pennsylvania and Treasurer Robert P. Casey, Jr. (Doc. No. 109.) Plaintiffs conceded that the Commonwealth was not properly named. Plaintiffs alleged absolutely no facts that would support a finding of liability against Treasurer Casey.

Legislative Defendants and Governor Rendell have moved to dismiss this action on the grounds that the repeal of Act 44 by Act 72 has rendered this entire action moot and therefore non-justiciable in federal court. Specifically to avoid such a mootness challenge, Plaintiffs sought leave to amend this action by representing to the Court that their Second Amended Complaint would allege an ongoing controversy that the Court could consider. Accordingly, in their Second Amended Complaint, Plaintiffs alleged that Act 72 might be invalidated by the Pennsylvania Supreme Court at some time in the future, and asserted that their constitutional challenges relate not just to Act 44, but to the process and manner by which such legislation came to be considered and enacted by the General Assembly, in concert with members of the Pennsylvania Supreme Court and the Governor. Notwithstanding such amendments to their original action, Plaintiffs continue their call for this Court to declare Act 44 unconstitutional and that the process by which it was enacted violated Plaintiffs' constitutional rights.

In determining whether it has been presented with a justiciable case or controversy, a federal district court must resolve questions of mootness before assuming jurisdiction over an action. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). A case is deemed moot when "[t]he controversy between the parties has . . . clearly ceased to be 'definite and concrete.'" Id. at 317 (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937)). Courts have held that repeal of a challenged statute renders the challenge moot. See, e.g., Kremens v. Bartley, 431 U.S. 119, 134 (1977) (Pennsylvania state legislature's repeal of statute governing procedures for voluntary commitment of

juveniles to mental health institutions rendered moot an action challenging the repealed legislation); Eagle Envtl., 237 F.3d at 192-94 (Congress's action in repealing challenged statute and replacing it with a different regulatory scheme mooted challenge because declaring statute unconstitutional or enjoining its enforcement would serve no purpose); Black United Fund of New Jersey, Inc. v. Kean, 763 F.2d 156, 160 (3d Cir. 1985) (court dismissed as moot action challenging constitutionality of state statute where statute was repealed and replaced with new legislation because "[t]he raison d'etre for the injunction no longer exists.").

Courts have held that the mere potential for an unconstitutional law to be reenacted is insufficient to overcome mootness, and instead have held that there must be evidence that the challenged law will likely be reenacted. See, e.g., Nat'l Black Police Ass'n v. Dist. of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997); Jones v. Temmer, 57 F.3d 921, 923 (10th Cir. 1995) ("Defendants assert that the claims are not moot because the Colorado legislature remains free to reinstate the old law at a later date. We view this possibility as too conjectural and speculative to avoid a finding of mootness"); Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994) ("a statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed" unless "it is virtually certain that the repealed law will be reenacted"); cf. County of Morris v. Nationalist Movement, 273 F.3d 527, 534 n.4 (3d Cir. 2001) (holding declaratory judgment action moot where challenge focused on a prior municipal statute that was subsequently amended).

In their prayer for relief, Plaintiffs seek, inter alia, entry of orders declaring that Act 44 is "invalid and without any force or effect . . . [and] that the Act itself violates the United States Constitution." (Doc. No. 23 at 59-60.) Because Act 44 has been repealed in its entirety, Plaintiffs' claims relating to the Act itself and their prayer that this Court enter orders declaring Act 44 unconstitutional and of no force and effect are moot. To find otherwise would require this Court to enter an advisory opinion regarding constitutional issues where none is necessary.

Plaintiffs speculate that Act 72, which repealed Act 44, might be invalidated by the Pennsylvania Supreme Court. Whether or not this happens, however, has no bearing on the present justiciability of Plaintiffs' claims as they are now postured, in light of the fact that Act 44 is no longer operative law. Plaintiffs have made no such showing that Act 44 is likely to be reenacted, and the Court therefore finds that the General Assembly's repeal of Act 44 has rendered moot Plaintiffs' claims calling for the Act to be declared unconstitutional.[7]

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[7] In their papers and during oral argument, Plaintiffs refer to an element of Act 44 that allowed members of the General Assembly to be reimbursed for unvouchered expenses, thereby enabling the legislators to receive a de facto increase in their compensation prior to the effectiveness of the pay raise in 2006. Plaintiffs note that the repeal of Act 44 did not require that any disbursements for unvouchered expenses be returned. Regardless of these allegations, Plaintiffs have not sought any relief with respect to the unvouchered expenses, and the allegations have no bearing on the Court's mootness inquiry.

Plaintiffs' direct challenge to Act 44 is supplemented in Plaintiffs' Second Amended Complaint with serious allegations that elected public officials conspired to violate Plaintiffs' fundamental constitutional rights to free speech and due process in the consideration and enactment of Act 44. Plaintiffs claim that even if their challenge to the statute itself is mooted by Act 44's repeal, they suffered identifiable constitutional deprivations that give rise to a federal cause of action, and that this cause of action is properly before the court. These claims raise fundamental questions regarding whether such claims are legally cognizable and whether Plaintiffs have the requisite standing to bring this action in federal court.

2. Standing

As Chief Justice Roberts recently wrote, "If a dispute is not a proper case or controversy, the courts have no business deciding it or expounding the law in the course of doing so." DaimlerChrysler Corp. v. Cuno, 547 U.S. __, 126 S. Ct. 1854, 164 L. Ed. 2d 589, 601 (2006). Although vested with vast powers when jurisdiction is properly invoked, federal courts, from their inception to this day, are courts of limited jurisdiction, empowered to hear only Article III cases or controversies. This limitation, carefully crafted to limit the reach of the judiciary into the affairs of the other branches, maintains a critical balance of power between co-equal branches of government, and ensures that appointed judges do not usurp the rightful authority of duly elected representatives of the people. Thus, Article III defines the authority of the judiciary and conversely limits access to the courts to those litigants possessed of what courts have come to term "standing." As the Supreme Court has explained:

> The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." . . . As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit.

Valley Forge Christian College v. Americans United for the Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

A court will find Article III standing satisfied only if a plaintiff demonstrates: (1) that it has suffered an injury in fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendants; and (3) it is likely, as opposed to merely speculative, that the inquiry will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); see also Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (alleged injury "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract.").

Standing operates not to "slam the courthouse door against plaintiffs who are entitled to full consideration

of their claims on the merits,"[8] but to limit the Court's interference into matters properly reserved to other branches of government. In addition to constitutional requirements, and of particular relevance to the case at bar, the Supreme Court has emphasized that even when a plaintiff has articulated redressable injury, the Court has, due to prudential considerations, "refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Valley Forge, 454 U.S. at 475 (citations omitted) (emphasis added). In Valley Forge, the Court explained the stark consequences for a plaintiff unable to demonstrate constitutional standing:

> Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States. Article III, which is every bit as important in its circumspection of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit

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[8] See Valley Forge, 454 U.S. at 490 (Brennan, J., dissenting) (citation omitted).

> its authority with respect to both States and individuals.

Id. at 475-76 (emphasis added).

In addition to the foregoing considerations, each plaintiff must have standing to sue in their own right. Sch. Dist. of Phila. v. Pa. Milk Mktg. Bd., 877 F. Supp. 245, 250 (E.D. Pa. 1995). Additionally, plaintiffs must demonstrate standing separately for each form of relief sought in the action. See, e.g., Laidlaw, 528 U.S. at 185; City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (notwithstanding plaintiff's standing to sue for money damages, he lacked standing to sue for injunctive relief). Accordingly, the Court will analyze separately below the standing of the individual Plaintiffs who are before the Court as citizens of the Commonwealth, the associational standing of Common Cause of Pennsylvania and the League of Women Voters, and the standing of Representative Greg Vitali. Finally, the Court will distinguish the case at bar from other cases in which courts found that plaintiffs possessed standing to sue for specific, particularized violations of their own constitutional rights resulting from legislative action and where courts found that they had jurisdiction to grant relief for such harm.

a. Citizen Plaintiffs

Four of the Plaintiffs in this action, Tim Potts, Carl Silverman, William Koch, and H. William McIntyre, are individual residents of the Commonwealth of Pennsylvania and bring this action only in their capacities as taxpayers who pay taxes into the state's general fund. (Doc. No. 23, ¶¶ 11-14.) There are no allegations in the Second Amended Complaint alleging

particularized injury to these individual citizens by either the enactment of Act 44, nor in the process by which such legislation came to be considered or adopted, nor in the sweeping allegations of collusion between the Pennsylvania Supreme Court, the General Assembly, and the Governor which Plaintiffs contend are sufficient to demonstrate due process violations. Indeed, in several instances, Plaintiffs essentially concede that their alleged injuries are neither individual nor particular, but are instead general grievances shared by "the vast majority of the citizens of the Commonwealth as a class" or "the vast majority of similarly situated citizens of the Commonwealth" who share an asserted right to "representation in the legislative process of state government equal to representation of similarly situated citizens represented" by the General Assembly's leadership. (Second Am. Compl. ¶¶ 89, 90.) Plaintiffs have also cobbled together a due process violation based on the inclusion of a non-severability provision in repealed Act 44 on the theory that because judges cannot be expected to invalidate a nonseverable legislative package that included their own pay raise, Act 44 denies Plaintiffs meaningful access to a fair and impartial tribunal to challenge the legislation within the state judicial system. Plaintiffs further allege a violation of the laws for any constituent of a legislator whose power to draft or debate bills is curtailed by the General Assembly's leadership.

Despite Plaintiffs' protests to the contrary, the foregoing claims are general in nature, shared by many if not all of the taxpaying citizens of the Commonwealth of Pennsylvania, and are at their core political grievances regarding the alleged manner in which Act 44 came to be considered and enacted by the

General Assembly. Without even reaching the doubtful question of whether the harms Plaintiffs allege represent cognizable constitutional claims under the facts pled, the Court can only find that these individual Plaintiffs have not demonstrated the sort of individual and concrete harm necessary to invoke the jurisdiction of the federal courts. Equally important, prudential considerations militate strongly against the Court finding standing over claims asserted in this case because they represent "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Valley Forge, 454 U.S. at 475. For all of these reasons, the Court finds that the individual Plaintiffs named above do not possess standing under Article III necessary to maintain this suit in federal court.

b. Common Cause and the League of Women Voters

In contrast to the standing of individual plaintiffs, an association or organization has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Laidlaw, 528 U.S. at 181 (citing Hunt v. Wa. State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). A mere interest in a problem, "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected.'" Schlesinger v. Reservists Comm.

to Stop the War, 432 U.S. 333, 343 (1977) (quoting Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

Plaintiff Common Cause of Pennsylvania alleges that it is a "national non-partisan citizen advocacy organization concerned with advancing integrity in government." (Second Am. Compl. ¶ 8.) Its principal goal is "governmental accountability and responsiveness," which it promotes through a variety of activities, including litigation. (Id.) Common Cause represents that it has "over 10,000 members in Pennsylvania, most if not all of whom pay taxes into the state's general fund." (Id.) Plaintiff League of Women Voters of Pennsylvania is a non-partisan, membership-based, non-profit corporation that seeks "to promote the informed and active participation of citizens in their government." (Id. ¶ 9.) The League has historically opposed legislation and procedures "designed to circumvent the constitutional process" and pursues this mission through outreach, education, lobbying, and litigation. (Id.) The League represents that most of its members pay taxes into the state's general fund. (Id.)

Neither Common Cause nor the League alleges that even one of their members has standing to sue in their own right, other than to imply that their members share the constitutional rights of all Pennsylvanians, and that this action seeks redress for alleged violations of such rights. The Court has already found that such a generalized claim does not constitute the kind of individual, particularized injury necessary to find standing under Article III. No matter how sincere or vital to the preservation of an informed electorate, Plaintiff organizations' long-standing interest in the political problems at issue in this case do not operate

alone to give them standing to litigate this dispute. Accordingly, the Court cannot find that either organization or association has the requisite standing to bring this action in federal court.

c. Representative Greg Vitali

Plaintiff Greg Vitali is a Member of the Pennsylvania House of Representatives whose 166th state legislative district is within Delaware County, Pennsylvania.[9] (Id. ¶ 10.) Plaintiff Vitali alleges that he voted against Act 44. (Id.) Plaintiff Vitali further represents that he pays taxes into the Commonwealth's general fund. (Id.) Representative Vitali alleges no facts that are unique or held by him personally, and he makes no claim of a deprivation of a personal right such as a claimed right to take his seat with the legislature or to have his vote counted. Instead, Representative Vitali has merely joined the other Plaintiffs in complaining about the manner in which the legislative leadership of the General Assembly monopolized debate on Act 44, and in describing his claims as implicating the First and Fourteenth Amendments to the United States Constitution. Thus, Representative Vitali lacks standing for the same reasons that the individual citizen Plaintiffs lack standing. The fact that Representative Vitali is a member of the General Assembly does not alter the Court's finding, because he has not alleged that as a legislator he suffered the

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[9] The Court notes that the individual citizen Plaintiffs reside in Dauphin, Lancaster, and Cumberland Counties and are therefore not represented in the General Assembly by Representative Vitali. (Second Am. Compl. ¶¶ 11-14.)

sort of concrete and personal harm that is a prerequisite of standing. Instead, his claims can be read broadly only as an attack on the actions taken by the General Assembly's leadership that arguably compromised his power to influence proposed legislation or otherwise exercise a measure of control over the process by which it was enacted. The Supreme Court has expressly rejected the argument that "abstract dilution of institutional legislative power" will be sufficient to confer Article III standing on a legislative plaintiff. Raines v. Byrd, 521 U.S. 811, 826 (1997). Regardless of Plaintiffs' arguments to the contrary, Plaintiff Vitali's claims of injury as pled do not provide him with standing to litigate this dispute in federal court.

Defendants have advanced the proposition that any Vitali claim would fail because there exist essentially no circumstances under which a federal court might properly entertain a suit against state legislative bodies regarding a state legislative matter. The Court specifically rejects this view. In finding that in this action, no Plaintiff, including Representative Vitali, has alleged the type of individualized harm actionable in federal court, this Court does not countenance the suggestion that no act of the state legislature undertaken in the conduct of its political business, no matter how outrageous or blatantly illegal, would trigger federal jurisdiction.

Properly pled, constitutional grievances generated by the legislative processes can rise to an Article III controversy that may be presented in federal court. For example, in Bond v. Floyd, 385 U.S. 116 (1966), Julian Bond, a duly elected member of the Georgia House of Representatives, instituted an action in

federal district court seeking injunctive relief and a declaratory judgment that the state legislature's action of excluding him because of statements he made criticizing the Vietnam War and the Selective Service laws was an unconstitutional violation of the First Amendment. On appeal before the Supreme Court, defendants acknowledged that if the legislature had excluded a legislator on racial or other clearly unconstitutional grounds that legislator would "be justified in testing the exclusion by federal constitutional standards," but argued that there should be no judicial review of a state legislature's power to judge whether a prospective member may conscientiously take an oath of loyalty required by the State and Federal Constitutions, and apparently argued that Bond's statements violated that oath. Id. at 131-32. The Supreme Court disagreed, holding that the state legislature was not empowered to use its requirement that its legislators take an oath of office to prevent legislators from exercising their right under the First Amendment to dissent from national or state policy, and rejecting the state's argument that it could apply a stricter First Amendment standard to its members than to the general public. Id. at 132-34. In making its ruling, the Supreme Court necessarily found that plaintiff had standing to assert his rights in federal court, and that the federal courts were empowered to enter declaratory relief against a state legislative body found to have violated a member's constitutional rights.

Similarly, in Ammond v. McGahn, a Democratic member of the New Jersey State Senate, along with certain of her constituents, brought suit under 42 U.S.C. § 1983 against, inter alia, members of the Democratic Caucus of the New Jersey State Senate,

seeking to enjoin the Caucus's decision to oust her in retaliation for certain public statements that she made. 390 F. Supp. 655, 657 (D.N.J. 1975). Ammond alleged that her exclusion from the Caucus violated her right to free speech; her constituents claimed that the exclusion of their duly elected representative from the Caucus denied them equal protection under the Fourteenth Amendment. Id. The district court initially rejected as "inconceivable" the defendants' argument that they were cloaked with absolute legislative immunity from suit in federal court and, relying on Bond, held that the court had jurisdiction to consider plaintiff's claims under 42 U.S.C. § 1983. Id. at 658. Upon consideration of the evidence presented, the district court entered a preliminary injunction despite the uncontested fact that the Caucus had taken action to readmit plaintiff. Id. at 661, 663.

Although the Third Circuit reversed the grant of a preliminary injunction on appeal, its decision was not grounded in a finding that the district court lacked jurisdiction over the claims, nor that Senator Ammond or her constituents lacked standing to prosecute the action in federal court. Instead, the Court found that the record revealed that the Caucus had voted to readmit the plaintiff, and that the evidence did not suggest that the Caucus was likely to exclude plaintiff again in the future. Ammon v. McGahn, 532 F.2d 325, 329 (3d Cir. 1976).[10]

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[10] The Court did note that the rights of the parties were "far from clear" and expressed some concern about "the possible conflict between the associational and political rights of the Caucus members, as well as plaintiffs' constitutional rights. 532 F.2d at 329.

In extremely narrow circumstances, a bare majority of the Supreme Court even found that state legislators had standing to bring a claim in federal court alleging institutional and personal injury where plaintiff state legislators alleged that their votes on a particular matter were actually nullified. See Coleman v. Miller, 307 U.S. 433, 438 (1939); but see Raines v. Byrd, 521 U.S. 811, (1997) (distinguishing Coleman and explaining the especially limited reach of the holding in that case).[11]

Review of these cases confirms that in actions where plaintiffs have alleged specific personal harm, including specific constitutional violations caused by or through the conduct of a state legislative body, federal courts may have jurisdiction to consider a plaintiff's claims and, if appropriate, enter necessary relief against such a legislative body. These cases are, however, readily distinguishable from the facts alleged in this case. In Bond and Ammond, legislators and their individual constituents brought suits alleging specific, particularized instances of action by state legislative bodies to violate constitutional rights particular to the individual plaintiffs.[12] These cases do

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[11] In Coleman, the legislative plaintiffs were found to have standing based upon "a plain, direct, and adequate interest in maintaining the effectiveness of their votes." 307 U.S. 433, 438. The Supreme Court has since cautioned that this language of Coleman – which concerned actual allegations of vote nullification – cannot be interpreted to mean that claims regarding "the abstract dilution of institutional legislative power" will be sufficient to satisfy Article III's standing requirements. Byrd, 521 U.S. at 826.

[12] In these cases, the lead plaintiffs were legislators who were joined in their suits by individual constituents from their

not support a broader proposition, tacitly suggested by Plaintiffs in this case, that Plaintiffs automatically have standing to allege widespread claims of constitutional violations relating to the manner in which legislation is drafted, considered, and enacted. Plaintiffs have affirmed that Representative Vitali does not and cannot allege exclusion or any other individual violation of a constitutional right. Rather, Representative Vitali joins other Plaintiffs in objecting to the alleged usurpation of the powers of the elected representatives by a select few of its members who occupy leadership positions. As Byrd makes clear, these kinds of general allegations regarding "the abstract dilution of institutional legislative power" are insufficient to confer on Representative Vitali standing necessary to bring this action.

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legislative districts who claimed that their own constitutional rights were violated by the injury caused, or alleged to have been caused, their representatives. As an initial matter, none of the individual citizen Plaintiffs in this case reside in Representative Vitali's legislative district, and their claims cannot be considered as derivative of constitutional claims that their individual representatives might have, but did not, advance. Furthermore, the standing of the citizen plaintiffs in Ammond does not appear to have been challenged, nor was it the focus of the courts' analysis. Furthermore, in Bond, the district court had dismissed the complaint as to two of Bond's constituents "because they lacked a sufficiently direct interest in the controversy as would give them standing." Bond, 385 U.S. at 137 n.14. The Supreme Court commented that it was "express[ing] no opinion on the question of whether Bond's constituents can claim that concrete adverseness which would be necessary to give them standing." Id. These cases thus do not speak clearly on the question of constituent standing.

For all of the foregoing reasons, the Court finds that none of the Plaintiffs has standing to prosecute this action in federal court, and the matter is therefore non-justiciable and must be dismissed.

B. Even if Plaintiffs Had Standing to Bring this Action, They Have Not Asserted Cognizable Federal Claims that Would Entitle Them to Relief in this Court.

Even were one or more Plaintiffs able to modify their claims to allege individualized harm, they must state a cognizable constitutional claim that would entitle them to relief. No Plaintiff has done so here. In reaching this conclusion, the Court again notes that the mere fact that Plaintiffs have alleged constitutional deprivation does not automatically entitle Plaintiffs to present those claims in federal court; rather, it is the specific nature of the rights asserted that determines whether Plaintiffs have stated a recognized constitutional claim.[13] As the following discussion shows, Plaintiffs have not asserted any rights protected by the United States Constitution or federal law that entitle them to redress in our federal courts.[14]

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[13] See Steel Co. v. Citizens Bank for a Better Env't, 523 U.S. 83, 89 (1998).

[14] The Court does not reach, and expresses no opinion on, Plaintiffs' claims that the Defendants have violated certain provisions of the Pennsylvania Constitution by the manner and process in which Act 44 was enacted. Because the Court has found Plaintiffs' claims are non-justiciable and fail to state cognizable federal claims, the Court need not consider Plaintiffs' pendent state claims.

In Count I of the Second Amended Complaint, Plaintiffs aver that the Defendants engaged in a conspiracy under 42 U.S.C. §§ 1985(3) to deprive Plaintiffs of their federal civil rights. " Id. In order to maintain an action under 42 U.S.C. § 1985(3), a plaintiff must demonstrate:

> (a) that a racial or other class-based invidious discriminatory animus lay behind the coconspirators' actions, (b) that the coconspirators intended to deprive the victim of a right guaranteed by the Constitution against private impairment, and (c) that the right was consciously targeted and not just incidentally affected.

Plaintiffs meet none of these requirements. Plaintiffs do not allege that any of the Defendants entered into an agreement that consciously targeted, or sought to deprive, any of the Plaintiffs' constitutional rights, nor do Plaintiffs put forth any facts that would support a finding by the court to find that they are members of an identifiable class against whom Defendants conspired to discriminate.

Plaintiffs attempt to circumvent this second hurdle by alleging that they are members of a class of people "denied representation in the legislative process of state government equal to the representation of similarly situated citizens represented by the Leaders [of the General Assembly]." (Second Am. Compl. ¶ 90.) It is well established that such a broad aggregation of citizens does not qualify as a class for purposes of § 1985(3) because "the class 'cannot be defined simply as the group of victims of the [allegedly] tortious action.'" Bray v. Alexandria Women's Health Clinic,

506 U.S. 263, 269-70 (1993) (quoting United Bhd. of Carpenters & Joiners of Am., Local 610 AFL-CIO v. Scott, 463 U.S. 825, 850 (1983)). The Third Circuit recently held that a putative class that consisted only of alleged constitutional tort victims "cannot serve as a cognizable class within the purview of § 1985(3)." Farber v. City of Paterson, 440 F.3d 131, 138 (3d Cir. 2006). Accordingly, Plaintiffs' failure to plead allegations necessary to support a cognizable claim for conspiracy under § 1985(3) is fatal to Count I of the Second Amended Complaint.

In Count II, Plaintiffs allege that the General Assembly's inclusion of a non-severability clause in Act 44 infringed Plaintiffs' due process rights by denying them the ability to obtain "a fair hearing before an impartial tribunal." (Second Am. Compl. ¶ 145.) In a nutshell, Plaintiffs are claiming that by attaching a non-severability clause to Act 44, Defendant legislative leaders rendered Act 44 untouchable by the judiciary because by invalidating Act 44, judges would also invalidate their own salary increases. (Second Am. Compl. ¶ 136.) Accordingly, Plaintiffs contend that they have no recourse to the state courts to challenge Act 44, resulting in a violation of their due process rights. Plaintiffs' claim that access to the courts is denied because the state judiciary is incapable of dispassionate review finds no factual or legal support. Although Plaintiffs may prefer a different forum, the doctrine of necessity, long-recognized by Pennsylvania and federal courts, permits the Pennsylvania courts to hear Plaintiffs' claims. The doctrine of necessity provides that a court may decide a case, even though its members have a financial interest, when the claim could not otherwise be reviewed in any court. See United States v. Will, 449 U.S. 200, 215 (1980); see

also Philadelphia v. Fox, 64 Pa. 169, 185 (1879) ("The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest – where no provision is made for calling another in, or where no one else can take his place – it is his duty to hear and decide, however disagreeable it may be."). As these cases make clear, to the extent Plaintiffs have a viable cause of action to challenge Act 44 in state court, the existence of a non-severability clause does not automatically render the case non-justiciable by any judge in the Pennsylvania court system, including the Pennsylvania Supreme Court. State courts have entertained challenges to pay raises in the past, see, e.g., Consumer Party v. Pennsylvania, 507 A.2d 323 (Pa. 1986), and may well do so in the future. Plaintiffs cannot articulate a due process claim simply by alleging that Pennsylvania judges have a financial stake in any review of Act 44.[15]

In Count III, Plaintiffs also claim generally that the process used by Defendants to enact Act 44 violated their due process rights. (Second Am. Compl. ¶ 147.) Although Plaintiffs do not specifically allege that Act 44, before it was repealed, infringed on their life, liberty, or property interests, they appear to be suggesting that they were entitled to receive notice and procedural safeguards before Act 44 was even enacted. As Defendants aptly note, such a claim reflects a misunderstanding of our representative form of government. Plaintiffs are constructively noticed

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[15] Plaintiffs expanded this claim at argument to allege that because Chief Justice Cappy has publicly spoken in favor of the pay raise, no Pennsylvania Supreme Court justice would ever vote against it, making state court review only a formality. See Tr. of Oral Argument, May 19, 2006, at 49:1-6.

and present for every legislative act of government through their elected representatives. When their representatives are misguided, unresponsive, or ineffectual, they are directly answerable to the people. Absent an actionable claim for institutional exclusions or specific and particular claims of individual harm, as in the narrow circumstances discussed above, Plaintiffs resort is to the ballot box, not the courts.[16]

It is black letter law that there is no actionable constitutional right to due process in the manner in which legislation affecting a broad class of society is enacted. Barefoot v. City of Wilmington, 306 F.3d 113, 124 (4th Cir. 2002) ("When a legislature passes a law which affects a general class of persons, the political process provides all the process that is due."). In a case where the Supreme Court rejected a petitioner's suit to enjoin a state tax commissioner from enforcing a tax increase on all taxable property in Denver, Colorado, because the tax was enacted without a public hearing, Justice Oliver Wendell Holmes explained that:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts be done in town meeting or on assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin,

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[16] Defendants note that the events that followed Act 44's enactment and quick repeal perfectly illustrate this concept. Defendants Jubilerer and Brightbill recently failed in their reelection bids, as did a sitting justice of the Pennsylvania Supreme Court.

> without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).[17] See also Rogin v. Bensalem Twp., 616 F.2d 680, 693 (3d Cir. 1980) ("To provide every person affected by legislation the various rights encompassed by procedural due process including hearings, opportunity for confrontation and response, clear standards, an impartial arbiter, and possibly judicial review would be inconsistent with the structure of our system of government."). Following these established principles, the Court must find that Plaintiffs have articulated no cognizable due process

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[17] In reaching this conclusion, the Court distinguished its prior ruling in Londoner v. Denver, 210 U.S. 373 (1908), in which a local board was charging with "determin[ing] 'whether, in what amount, and upon whom' a tax for paving a street should be levied." Bi-Metallic, 239 U.S. at 445 (explaining Londoner, 210 U.S. at 385). In Londoner, the Court held that before such taxes could be levied against a small number of people, the affected property owners had a right to a hearing. Londoner, 210 U.S. at 385 (1908). The Court in Bi-Metallic distinguished this holding by noting that in Londoner, "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid." Bi-Metallic, 239 U.S. at 446. In the case at bar, the challenged legislation applied to the entire Commonwealth of Pennsylvania; accordingly, the rule enunciated in Bi-Metallic is more directly on point and governs Plaintiffs' claims of due process in this action.

violation on the basis that Act 44 was enacted without public hearing.

In Count IV, Plaintiffs claim that the Defendants violated their right to equal protection under the law by diluting the power and influence of their representatives. (Second Am. Compl. ¶ 149.)[18] Plaintiffs argue that the legislative process used to enact Act 44 amounted to an "[e]xercise of power which places certain voters at a disadvantage vis-a-vis other groups of similarly situated voters." (Doc. No. 103 at 55.) Thus, Plaintiffs contend that they were denied "equal representation in the entire legislative process of the Commonwealth." (Id. at 53.)

Plaintiffs rely on Reynolds v. Sims, 377 U.S. 533 (1963) for the proposition that the legislative process at issue in this case caused them to be treated differently from similarly situated Pennsylvania citizens who were represented by members of the General Assembly's leadership in such a way as to support an equal protection claim. Plaintiffs' reliance on Reynolds is misplaced. Reynolds recognizes that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the States." Id. at 568 (emphasis added). The holding of Reynolds is thus that when a state creates voting districts, it must

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[18] Plaintiffs also include a meritless due process claim in Count IV that is redundant of their claim in Count III.

do so in such way as to ensure, to the extent possible, the one-person, one-vote rule is applied. As the Senate Leadership correctly notes, Reynolds does not hold that individuals have a right to participate directly in the legislative process, nor does it suggest that every member of a state legislative body is constitutionally entitled to participate equally in drafting, sponsoring, or promoting legislation.

The Third Circuit rejected a very similar argument in Parker v. Merlino, 646 F.2d 848 (1981). In Parker, 13 Republican Senators of the New Jersey State Senate and a number of their constituents alleged, inter alia, that the Democratic-controlled Senate's invocation of a parliamentary rule to cut off debate on two bills deprived the Senators' constituents "of their 'right' to 'full and effective' participation in the Senate which is accomplished by the vicarious actions of their representatives,' as well as deprive the plaintiff Senators of their 'right' to 'fully and effectively represent (their) constituents.'" Parker, 646 F.2d at 855. The Third Circuit rejected plaintiffs' argument that Reynolds lent support for the proposition that the courts "be protective of the elements of the legislative process, one of which, according to plaintiffs, is 'reasonable' debate on all matters before our legislatures." Id. The Court found nothing in Reynolds to hold that failure to allow state legislators reasonable debate in all instances deprived them from fully representing their constituents, and found that their constituents were not deprived of full representation.

As Plaintiffs' claims of equal protection violations are predicated only on allegations of a truncated legislative process with respect to one piece of

legislation that was drafted and controlled by the General Assembly's leadership are unavailing, the Court finds they have failed to articulate a cognizable equal protection claim.

Finally, in Count V of the Second Amended Complaint, Plaintiffs allege that the legislative process by which Act 44 was enacted deprived Plaintiffs of their First Amendment right to lobby their legislative representatives about Act 44 before it was enacted. (Second Am. Compl. ¶ 151.) It is settled law that no such right exists. In Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984), the Supreme Court stated as follows:

> Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. Legislatures throughout the Nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received only from a select group. . . . To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.
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> ***
>
> However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation. . . . Nothing in the First Amendment or in this Court's case law

> interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.

Id. at 284-85. Notwithstanding Plaintiffs' firm conviction that their right to petition their representatives regarding Act 44 was infringed by the allegedly secretive and truncated nature of the enactment of Act 44, the above holding from Knight completely disposes of any such claim that Plaintiffs had a right under the First Amendment to petition the General Assembly in advance of the bill's passage other than through their elected representatives. Accordingly, Plaintiffs' First Amendment claim is facially without merit and must be dismissed.

C. Even if Plaintiffs Had Alleged Cognizable Federal Claims, the Court is Without Authority to Grant the Relief Plaintiffs Seek.

In addition to finding that this action presents a non-justiciable case or controversy and that Plaintiffs have failed to assert cognizable claims under the United States Constitution or federal law, the Court finds further that it lacks legal authority to enter the prospective injunctive and declaratory relief Plaintiffs have requested. In substantive part, Plaintiffs have asked that this Court:

- enjoin the Pennsylvania Supreme Court from citing to or relying on certain of its decisions, and any subsequent case relying upon such decisions, as precedent in future cases

challenging legislation as being enacted in violation of the Pennsylvania Constitution;

- declare Act 44 is unconstitutional, invalid, and without any force or effect and enjoin Defendants from enforcing any of its provisions;

- declare that the process by which Act 44 was enacted violated the United States Constitution;

- declare that private conversations on legislative matters that might come before the Pennsylvania courts between members of the judicial and other branches of state government violate the United States and Pennsylvania Constitutions; and

- permanently enjoin Defendants and their successors in office from enacting further legislation in violation of Article III of the Pennsylvania Constitution and by similar means that inhibit and deprive citizens of their right to freedom of political speech.

(Second Am. Compl. at 59-60.)

Plaintiffs' first request can be dismissed out of hand; indeed, it is difficult to believe Plaintiffs could make such a request in good faith. Plaintiffs have not cited, and the Court does not find, any authority that would support this Court entering an order to prevent the highest court of Pennsylvania from relying on its own precedential decisions in future cases. Plaintiffs have not offered any authority for this direct attack upon the sovereignty of the Commonwealth because no such authority exists. Plaintiffs ignore the well-settled

principle that a federal district court has no jurisdiction to review a final judgment of a state court. It follows that federal district courts have no jurisdiction to review – much less restrain a state court from relying upon – a final judgment of a state supreme court; only the United States Supreme Court has such authority. Dist. of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 483 n.16 (1983). As the Third Circuit explained only last year, the Rooker-Feldman doctrine establishes that a federal court has no jurisdiction to grant relief that "would prevent a state court from enforcing its orders." Knapper v. Bankers Trust Co. (In re Knapper), 407 F.3d 573, 581 (3d Cir. 2005) (citations omitted). The Court explained that federal courts lack subject matter jurisdiction over such claims that, if granted, "would reduce the state court judgments to nullities." Id. at 582; cf. Bush v. Gore, 531 U.S. 98, 142 (2000) ("Federal courts defer to state high courts' interpretation of their state's own law. This principle reflects the core of federalism, on which all agree.") (Ginsburg, J., dissenting). Accordingly, the Court has no jurisdiction to grant the relief requested with respect to settled decisions of the Pennsylvania Supreme Court.

The second category of relief requested relates to the alleged unconstitutionality of Act 44. As has been discussed above, Act 44 has been repealed and is of no further force or effect. Claims relating to the constitutionality of such legislation are therefore moot. In the absence of such a case or controversy, it is a bedrock principle of constitutional law that federal courts will not have jurisdiction to consider the action, nor to enter an advisory opinion in the matter. Because no actual case or controversy exists with respect to the constitutionality of Act 44, the Court has

no power to issue a ruling as to the law's constitutionality.

In their final requests for injunctive and declaratory relief, Plaintiffs ask that this Court enter an order making it unlawful for members of the Commonwealth's various elected branches to confer with one another regarding legislative matters that might possibly come before the Pennsylvania courts. Additionally, Plaintiffs request that this Court permanently enjoin Defendants and their successors from any future First Amendment violations. Plaintiffs would have this Court interfere with and superintend the future conduct of elected officials of a sovereign state in fulfilling the obligations of their respective offices – before such officials have enacted any legislation or taken any official action. Plaintiffs' request invites the familiar admonition: " be careful what you wish for . . ." Although with respect to a 54% legislative pay raise or allegations of judicial case-fixing there may be wide agreement on how the Court should rule, it is unlikely that such ready consensus exists in other matters that will be the subject of fierce debate and compromise on a daily basis in the halls of our state legislatures in the months and years ahead. If the Court accepted Plaintiffs' proposed appointment as permanent overseer of the Pennsylvania courts and legislature, and undertook to dictate its own solutions to the great public policy debates of our time, it would surely soon confront the obvious question of by what authority an appointed official second-guesses the will of the people's elected representatives. For these very reasons, it is well established that the Court has no power to grant the relief requested here. See, e.g., New Orleans Water Works Co. v. City of New Orleans, 164

U.S. 471, 481 (1896) ("[T]he courts will pass that line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption."); McChord v. Louisville & Nashville R.R. Co., 183 U.S. 483, 495 (1902) ("The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction."); Assoc. Gen. Contractors of Am. v. City of Columbus, 172 F.3d 411, 415 (6th Cir. 1999) ("[t]he New Orleans Court made clear that the role of the court is to intervene, if at all, only after a legislative enactment has been passed."); Frison v. United States, 1995 U.S. App. LEXIS 32544, No. 95-5062, 1995 WL 686224, at *1 (D.C. Cir. Oct. 4, 1995) (unpublished) ("The district court appropriately declined to interfere prospectively with the exercise of legislative power by the United States Congress."); Alpers v. San Francisco, 32 F. 503 (N.D. Cal. 1887) ("The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. . . . The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the State or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction.").

A separate established principle, also relevant to this case, is that federal courts will not interfere with a state's distribution of power among its various branches of government. See, e.g., Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); Prentis v. Atlantic Coast

Line Co., 211 U.S. 210, 225 (1908) ("We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the United States Constitution is concerned."); Montgomery Nat'l Bank v. Clarke, 703 F. Supp. 1161, 1167 (D.N.J. 1989) ("It is well settled that the division of power among the branches of state government is not a matter of federal constitutional concern.") (citations omitted).

Tempting though it may be, the Court has no authority to dictate to the Pennsylvania General Assembly how that body must conduct itself when considering and enacting future state legislation, even to enter orders that would restrain Pennsylvania's elected officials from hypothetically engaging in future conduct that might violate the United States Constitution. Longstanding constitutional principles absolutely forbid this Court from dictating to Pennsylvania's current and future elected officials how to distribute power and responsibility for proposing or developing legislation going forward, much less to enjoin such officials from even discussing potential legislation or other matters of political business with one another in the course of fulfilling their official responsibilities.

As noted at the outset, to grant the relief Plaintiffs' seek would require that this Court abandon the modest role of the judiciary carved out by our founders for an activist posture never intended or authorized, and to ignore over a century of legal precedent. As Justice Powell wrote in United States v. Richardson, 418 U.S. 166 (1974):

> The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in Marbury v. Madison, 5 U.S. 137 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

Id. at 192 (Powell, J., concurring). For better or worse, the matters of which Plaintiffs complain belong to the political and electoral process. For over two hundred years, our people have trusted these processes to restrain their officials from abusing the power of office and making a mockery of our laws. It is not for this Court to alter the course of history now.

VII. Conclusion

For all of the foregoing reasons discussed in this memorandum, Plaintiffs' Second Amended Complaint must be dismissed in its entirety. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:05-CV-2036
(Judge Kane)

[Filed June 12, 2006]

COMMON CAUSE OF PENNSYLVANIA, et al.,	)
Plaintiffs	)
COMMONWEALTH OF PENNSYLVANIA, et al.,	)
Defendants	)

ORDER

AND NOW, this 12th day of June, 2006, upon due consideration, and for the reasons set forth in the within memorandum, **IT IS HEREBY ORDERED THAT** all pending motions to dismiss (Doc. Nos. 54, 80, 82, 85, 87, 90, 92) are **GRANTED** and this action is **DISMISSED**.

IT IS FURTHER ORDERED THAT all remaining motions are **DENIED** as moot. The Clerk of Court shall close the file.

s/ Yvette Kane
Yvette Kane
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

No. 06-3391

[Filed April 7, 2009]

COMMON CAUSE OF PENNSYLVANIA; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; REPRESENTATIVE GREGORY VITALI; TIM POTTS; CARL H. SILVERMAN; WILLIAM R. KOCH; H. WILLIAM McINTYRE,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD G. RENDELL, Governor; ROBERT P. CASEY III; DAVID G. ARGALL; DAVID J. BRIGHTBILL; H. WILLIAM DeWEESE; ROBERT C. JUBELIRER; ROBERT J. MELLOW; JOHN M. PERZEL; SAMUEL H. SMITH; MICHAEL VEON; RALPH J. CAPPY

(United States District Court for the Middle District of Pennsylvania No. 05-cv-02036)

SUR PETITION FOR PANEL REHEARING

Present: FLAUM, EBEL, and LEVAL, Circuit Judges*

The petition for rehearing filed by Appellants which is limited to panel rehearing in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT,

/s/David M. Ebel,
Circuit Judge

Dated: April 7, 2009
MB/cc: Paul A. Rossi, Esq.
Eric B. Schnurer, Esq.
Mark A. Aronchick, Esq.
Wendy Beetlestone, Esq.
Jonathan F. Bloom, Esq.
Thomas W. Dymek, Esq.
C. Clark Hodgson, Jr., Esq.
Amy L. Groff, Esq.
John P. Krill, Jr., Esq.
Linda Shorey, Esq.
Patrick Heffron, Esq.
Eugene F. Hickey, II, Esq.

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* Honorable Joel M. Flaum, United States Circuit Judge for the Seventh Circuit Court of Appeals, Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit Court of Appeals, and Honorable Pierre N. Leval, United States Circuit Judge for the Second Circuit Court of Appeals, sitting by designation.

James F. Tierney, IV, Esq.
Arlin M. Adams, Esq.
Bruce P. Merenstein, Esq.
Paul H. Titus, Esq.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

...